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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM M. RADIGAN - - - - Petitioner

vs.

SUPREME COURT OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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March 21, 1984

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QUESTIONS PRESENTED

I.

Whether the Court below denied petitioner due process of law under the Fourteenth Amendment to the Federal Constitution by failing to observe minimal presumptions of law as well as standards and burdens of proof in adjudicating petitioner in contempt of court.

II.

Whether the Court below denied petitioner his right to Federal due process of law by failing to provide clear and certain notice that petitioner was facing criminal contempt charges.

III.

Whether the Court below denied petitioner Federal procedural due process by finding him guilty of criminal contempt without affording him an opportunity to present or cross-examine witnesses and by acting in disregard of his Fifth Amendment privilege against self-incrimination.

IV.

Whether the Court below denied petitioner due process of law under the Federal constitution by holding him in contempt of Court when his conduct constituted both "substantial compliance" and a "good faith effort to comply" with the October 3, 1983 Order.

V.

Whether the Court below denied petitioner Federal due process of law by holding him in contempt of Court when the evidence revealed that petitioner lacked the present ability to comply with the October 11, 1983 deadline for filing the Appellant's Brief.

VI.

Whether the Court below denied petitioner Federal due process by finding him in contempt of court where there was no competent, probative evidence to support a finding of criminal contempt.

VII.

Whether the decision of the Court below to hold petitioner in contempt of Court, under the facts and circumstances at bar, was arbitrary and capricious and an abuse of due process of law under the Federal Constitution.

VIII.

Whether the Court below, in failing to recuse itself from the contempt proceedings in the above-captioned case, denied petitioner his constitutional right to a fair trial.

IX.

Whether the Court below denied petitioner Federal due process of law by suspending the imposition of his fine without setting any time limitation on the suspension and without delineating any terms and conditions for the suspension.

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v.

SUPREME COURT OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, William M. Radigan, prays that a writ of certiorari issue to review the opinion and order of the Supreme Court of Kentucky entered in this proceeding on November 2, 1983.

OPINIONS BELOW

The opinion and order finding the petitioner, William M. Radigan, in contempt of court and fining him $100 for his contempt, payment of the fine suspended to further conduct, was rendered by the Kentucky Supreme Court on November 2, 1983. That opinion and order is reported as *In Re Radigan,* Ky., 660 S. W. 2d 673 (1983). The Kentucky Supreme Court denied petitioner's motion to vacate on November 17, 1983 in an unpublished order. The Kentucky Supreme Court denied petitioner's motion to reconsider on December 22, 1983 in an unpublished order. Copies

of the above-mentioned opinion and orders are attached hereto.

JURISDICTION

The opinion and order of the Kentucky Supreme Court was entered on November 2, 1983. Petitioner's timely motion to reconsider was denied on December 22, 1983. An order extending the time to file the petition for writ of certiorari in the above-captioned cause to and including March 21, 1984 was entered by this Court on February 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution.

The Fifth Amendment to the United States Constitution, in pertinent part:

> . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent parts:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel.

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law . . .

STATEMENT OF THE CASE

On October 3, 1983, the Kentucky Supreme Court entered an order granting the indigent appellant in the case of *Joseph Herald* v. *Commonwealth of Kentucky,* Kentucky Supreme Court No. 83-SC-522-I, an extension of time to and including October 11, 1983 to file the initial appellant's brief and perfect the criminal appeal. The order of October 3, 1983 also directed that, "[i]f appellant's brief is not filed on or before October 11, 1983, counsel for the appellant [William M. Radigan, court-appointed appellate public defender] shall appear before this court on October 24, 1983, at 10:30 a.m., in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief" (Order, 10-3-83).

On October 11, 1983, Mr. Radigan[1] filed a motion for an extension of ten days in which to file the *Herald* brief. Prior to the Kentucky Supreme Court's ruling

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[1]At all times during his representation on appeal of Joseph Herald, the petitioner, William M. Radigan, was employed by the Kentucky Department of Public Advocacy, "an independent agency of state government," created "to provide for the establishment, maintenance and operation of a state sponsored and controlled system for," *inter alia*, "[t]he representation of indigent persons accused of crimes . . . which may result in their incar-

(Footnote continued on following page)

on this *timely* extension request of October 11, 1983, Mr. Radigan on October 21, 1983 tendered for filing the appellant's brief in the *Herald* case. Consequently, when Mr. Radigan appeared before the Kentucky Supreme Court on October 26, 1983 for the rescheduled show cause hearing, he had already tendered for filing as of October 21, 1983 the brief for appellant in the *Herald* case. On October 31, 1983, the Kentucky Supreme Court granted Mr. Radigan's motion for a ten-day extension and ordered the appellant's brief in the *Herald* case filed as of that date (Order, 10-31-83). Consequently, five days after the show cause hearing and three days prior to the issuance of the opinion and order holding Mr. Radigan in contempt, the Kentucky Supreme Court by order directed that the tendered appellant's brief in *Herald* be filed.

At the show cause hearing held in the instant case, the Chief Justice of the Kentucky Supreme Court commenced the hearing by stating:

> Mr. Radigan will attempt to explain — to show cause why he should not be punished for contempt for not filing an order of this Court — or complying with an order of this Court vis a vis the filing of a brief on a certain time (Tape of Hearing, hereinafter designated T.H.).

(Footnote continued from preceding page)

ceration . . . " KRS [Kentucky Revised Statutes] 31.010(1). Mr. Radigan was employed as an "assistant public advocate." According to Kentucky law, "[t]he assistant public advocates shall be attorneys, shall be appointed by the public advocate, and shall be covered by the merit system." KRS 31.020(4).

The Chief Justice then remarked, "I have talked to the Court and certainly Mr. Radigan you can go ahead and make whatever explanation you want. I have also, with the permission of the Court, Mr. [Paul] Isaacs [the Kentucky Public Advocate], let you say something, a very limited amount. Now I think Mr. Radigan should take the stand, as it were" (T.H.).

At that point Mr. Radigan told the Kentucky Supreme Court, "I think that I can explain the situation in one very simple word — caseload" (T.H.). Mr. Radigan then began to explain the caseload problems on appeal beseiging both the Department of Public Advocacy's appellate section and the individual appellate attorneys in that section.

Almost immediately Mr. Radigan, the petitioner, was interrupted by one of the court members, Justice Vance, who asked, "Is it true then from your talking about the caseload that if it had not been for the caseload you could have complied with this order to get the brief in on time" (T.H.)? Petitioner responded by explaining that at the time the show cause order at bar was entered, he was under a similar order from the Kentucky Court of Appeals, the intermediate appellate court of Kentucky, to file in that court a brief on which he had already started working (T.H.) Petitioner explained he was "attempting to get that brief finished at the same time when [the Kentucky Supreme Court's] order came out" and "[i]t was simply physically impossible for [him], timewise, to get any type of preparation done on this brief to comply with [the Supreme Court's] order" (T.H.).

Mr. Radigan then told the Kenutcky Supreme Court that since July 5, 1983, the date he received the *Herald* case, he had filed a total of fourteen (14) appellate briefs in the Kentucky Supreme Court and the Kentucky Court of Appeals as well as "several briefs in the federal district court" and one in the federal court of appeals (T.H.).

Petitioner explained that he completed the brief in the *Herald* case within ten days after he began reading the record (T.H.).

Justice Leibson then told Mr. Radigan that he found it "extremely unacceptable," "completely unacceptable," "this business of filing for an extension on the last day when the brief is due" (T.H.).

Mr. Isaacs, the Public Advocate, petitioner's ultimate administrative supervisor, then spoke briefly at the hearing, but explained that he would make no statements "concerning this particular case" for various reasons (T.H.). Mr. Isaacs only discussed his general commitment to try to solve the problems mentioned at the hearing (T.H.).

No other persons besides petitioner and Mr. Isaacs addressed the Kentucky Supreme Court at the hearing.

On November 2, 1983, in a published opinion and order, the Kentucky Supreme Court observed that a show cause "hearing was held on October 26, 1983, at which time Mr. Radigan appeared and offered explanation" for his failure to comply with the order of October 3, 1983. *In Re Radigan,* Ky., 660 S. W. 2d 673 (1983). The Kentucky Supreme Court in its opinion and order made numerous findings of fact. "The tran-

script of evidence was filed on June 10, 1983." *Id.* "Thereafter on three occasions on or about the day the brief was due the appellant failed to file but instead filed an affidavit, notice and motion for another thirty days extension." *Id.* "In each case the allegations of Mr. Radigan's affidavits are markedly similar." *Id.* After noting that "for the most part the six paragraphs of allegations in each affidavit parrot the preceding affidavit chapter and verse except for small differences in the first paragraph," the Kentucky Supreme Court concluded that "[i] sum they indicate counsel is reasonably busy, and nothing further." *Id.*

According to the Kentucky Supreme Court, "[a]t the oral hearing conducted on October 26, 1983, Mr. Radigan advised [the court] that he looked at the record for the first time on the last day of the third extension." *Id.* The Supreme Court of Kentucky emphasized that "[i]n spite of a pending show cause order he [petitioner] intentionally chose to work on other matters." *Id.*

The Kentucky Supreme Court observed that "[w]hen Mr. Radigan appeared in response to the Order of [the Kentucky Supreme Court] to show cause, his response was significantly inadequate." *Id.* at 674. The Kentucky Court found that "[t]he brief which [petitioner] has filed in the Joseph Herald case shows that it is a relatively simple case with few issues, all of a routine nature," which as petitioner "has admitted and demonstrated," is "a brief that should have taken ten days to prepare, filed 133 days after the transcript of evidence was filed." *Id.*

The Kentucky Supreme Court found "no acceptable excuse for beginning work on this case on October 11, 1983" and further found petitioner "in contempt of the Order . . . entered October 3, 1983, requiring him to file his brief on or before October 11, 1983 or appear to show cause why he should not be held in contempt for failure to do." *Id.* According to the Kentucky Supreme Court, petitioner's "explanations as to other work and projects occupying his time during the period in question" are "grossly inadequate." *Id.* The Kentucky Supreme Court found "no explanation for failing to notify [it] immediately if there were considerations that would legitimately have prevented [petitioner's] complying with" the October 3, 1983 Order. *Id.*

The Kentucky Supreme Court found petitioner in contempt of court and fined him $100 for his contempt. Because "this" was petitioner's "first conviction, payment of the fine [was] suspended subject to [petitioner's] further conduct." *Id.*

In his motion to vacate the opinion and order of the Kentucky Supreme Court rendered on November 2, 1983 as being obtained in violation of appellate due process under the Fourteenth Amendment of the United States Constitution, the petitioner argued that the decision in his case was rendered by a five justice court composed of three mandatorily disqualified justices and that the appellate tribunal was constituted in violation of §110(3) of the Kentucky Constitution. On November 17, 1983, the Kentucky Supreme Court

entered an order summarily denying petitioner's motion to vacate.

In his timely motion to reconsider the order holding him in contempt of court the petitioner asserted the following federal constitutional contentions that: (a) he was denied due process of law by the failure of the Kentucky Supreme Court to observe minimal presumptions of law as well as standards and burdens of proof in adjudicating him in contempt of court; (b) he was denied his right to due process of law by the Kentucky Supreme Court's failure to provide clear and certain notice that he was facing criminal contempt charges; (c) he was denied procedural due process by the Kentucky Supreme Court finding him guilty of criminal contempt without affording him an opportunity to present or cross-examine witnesses and by the court acting in disregard of his Fifth Amendment privilege against self-incrimination; (d) he was denied due process of law by the Kentucky Supreme Court holding him in contempt of court when his conduct constituted both "substantial compliance" and a "good faith effort to comply" with the court's order of October 3, 1983; (e) he was denied due process of law by the Kentucky Supreme Court holding him in contempt when the evidence revealed that he lacked the present ability to comply with the October 11, 1983 deadline for filing the appellant's brief in the *Herald* case; (f) he was denied federal due process by the Kentucky Supreme Court finding him in contempt where there was no competent, probative evidence to support a finding of criminal contempt; (g) he was denied due process

by the Kentucky Supreme Court's arbitrary and capracious finding, under the facts and circumstances at bar, that he was in contempt of court; (h) he was denied due process when the Kentucky Supreme Court violated the rule of the least judicial power and held him in contempt, even after he had by timely motion requested an extension to file the brief and tendered the brief within the requested period; (i) he was denied his constitutional right to a fair trial when the Kentucky Supreme Court failed to recuse itself from the contempt proceedings at bar; (j) he was denied due process by the Kentucky Supreme Court's judicial vindictiveness in holding him in contempt of court for requesting an extension of ten days past the court imposed deadline of October 11, 1983; and (k) he was denied due process by the Kentucky Supreme Court's suspension of the imposition of his fine without setting any time limitation on the suspension and without delineating any terms and conditions for the suspension. These were the federal constitutional contentions that the Supreme Court of Kentucky summarily overruled by denying petitioner's timely motion to reconsider the opinion and order holding him in contempt of court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Holding Petitioner In Contempt Of Court, Without Affording Him the Procedural Due Process Mandated by the Federal Constitution, Conflicts with Previous Decisions of the Court.

It is quite apparent from the wording of the order of October 3, 1983 that the purpose of including the

requirement of a "show cause" hearing was to "compel obediance to and respect for an order of court." *See Young* v. *Knight,* Ky., 329 S. W. 2d 195, 200 (1959). Thus, the Kentucky Supreme Court communicated to William M. Radigan only that it would seek to punish him by holding him in contempt if he did not "timely file" the appellant's brief in the *Herald* case. Such an order put petitioner on notice that he faced a show cause hearing limited to the question of civil, not criminal contempt. *Young* v. *Knight, supra; Hardin* v. *Summit,* Ky., 627 S. W. 2d 580, 582 (1982).

The opinion and order of November 2, 1983 is totally devoid of any language which indicates that the court below gave Mr. Radigan the benefit of any legal presumptions—such as the presumption of innocence or the presumption of compliance—or placed the burden of proof on the Kentucky court rather than on the alleged contemnor, Mr. Radigan. Finally, it is clear from a persual of the opinion and order in question that the court below did not assess the proof by an accepted, articulated standard of proof such as "proof beyond a reasonable doubt" or proof by "clear and convincing evidence."

In the instant case, the court's order of October 3, 1983 appeared to be drafted in terms of civil contempt, but the sanction of a $100 fine imposed *after* the appellant's brief in the *Herald* case had been tendered by Mr. Radigan clearly made the entire proceeding one of criminal contempt.

"It is not the fact of punishment but rather its character and purpose that often serve to distinguish

civil from criminal contempt." *Shillitani* v. *United States,* 384 U. S. 364, 86 S. Ct. 1531, 1535, 16 L. Ed. 2d 622 (1966), citing *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911). *See Hardin* v. *Summitt, supra* at 581.

In civil contempt, "the act of disobedience consist[s] solely 'in refusing to do what had been ordered, . . . not 'in doing what had been prohibited.'" *Shillitani* v. *United States, supra,* 86 S. Ct. at 1534. When the contemnor carries "the keys of his prison in his own pocket," the action "is essentially a civil remedy designed for the benefit of other parties and . . . to secure compliance with judicial decrees." *Id.*

To open the show cause hearing, Chief Justice Stephens announced that now "Mr.Radigan will attempt to explain . . . why he should not be punished for contempt for not . . . complying with an order of this Court vis a vis the filing of a brief on a certain time" (T.H.).

In its opinion of November 2, 1983, the court below stated that "[w]hen Mr. Radigan appeared in response to the Order of the Court to show cause, his response was significantly inadequate". *Id.,* at 674.

Obviously, the Kentucky court used the mere issuance of a "show cause" order, one promulgated in advance of any conduct which could be deemed a violation of any order, to denigrate Mr. Radigan's presumptions of either "innocence" or "compliance" and to shift the burden of proof from the court or its representative to Mr. Radigan. Such an approach, even by

the highest court of a State, is violative of the United States Constitution.

A review of the entire opinion and order under scrutiny reveals that the Kentucky Supreme Court at no time enunciated a standard of proof, such as "proof beyond a reasonable doubt" or "clear and convincing evidence," by which Mr. Radigan's conduct was found to be contumacious. Instead, the phrases employed to indicate the standard of proof employed in this decision are "significantly inadequate," "no acceptable excuse," and "grossly inadequate". *Id.*, at 674.

By depriving Mr. Radigan of these various federal constitutional protections, the Supreme Court of Kentucky effectively skewed the fact-finding process and undermined the correctness of its legal and factual determination. *Addington* v. *Texas,* 441 U. S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *In re Winship,* 397 U. S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Speaking within the context of a contempt proceeding, this Court in *In Re Oliver,* 333 U. S. 257, 68 S. Ct. 499, 507-08, 92 L. Ed. 682 (1948), held that due process of law requires clear and certain notice of the charge:

> A person's right to *reasonable notice of a charge against him,* and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . (emphasis added).

Only a show cause order issued by the court is able to provide reasonable notice of the charge necessary

for due process. "Reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed is basic to our system of jurisprudence." *Groppi* v. *Leslie,* 404 U. S. 496, 92 S. Ct. 582, 586, 30 L. Ed. 2d 632 (1972).

The show cause order of October 3, 1983 only gave notice of a possible *civil* contempt action. The obvious purpose and intent of the order of October 3, 1983 was to insure that a brief was promptly filed in the *Herald* case. When Mr. Radigan tendered that brief on October 21, 1983—five (5) days before the show cause hearing—he purged himself of that contempt. However, it is clear from the opinion and order of November 2, 1983 that Mr. Radigan was found guilty of *criminal* contempt. As the court below characterized it, Mr. Radigan's contempt was his "first conviction". *Id.,* at 674.

Without doubt, the nature of a criminal contempt proceeding is entirely different than civil contempt. No longer is there an attempt to compel action by the person; instead the individual is being punished for past offensive conduct. The only possible means for the court below to have altered the civil contempt action to criminal contempt was for a new show cause order to be issued specifying the possible action for which Radigan was to be punished.

The failure of the Supreme Court of Kentucky to give Mr. Radigan notice of the type of contempt he was facing constitutes a violation of due process of law. As this Court stated in *Gompers* v. *Buck's Stove &*

Range Co., 221 U. S. 418, 31 S. Ct. 492, 500, 55 L. Ed. 797 (1911):

> [E]very citizen . . . by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it was sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, *but to know that it is a charge, and not a suit* (emphasis added).

It is a fundamental precept that a civil contempt proceeding cannot be changed to criminal contempt without notice. In *Gompers*, this Court examined a situation where a company had filed a show cause motion against the leaders of a union for violating a previously issued injunction. *Id.*, 31 S. Ct. at 496. Following a show cause hearing, the judge imposed sentences of imprisonment on each defendant. *Id.*, 31 S. Ct. at 497-98. This Court, in determining that a criminal contempt punishment had been imposed in a case involving civil contempt, reversed the judgment and commented:

> There was therefore a departure — a variance — between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief in the equity cause, the court imposed a punitative sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in

> an action of "A vs. B, for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months. *Id.*

Similarly, Mr. Radigan should not have been punished for criminal contempt where the proceedings were for civil contempt.

From the tape of the show cause hearing, it is apparent that the court below was concerned about the fact that Mr. Radigan filed another extension motion on the day the brief was scheduled to be filed. This was likewise reflected in the opinion and order of November 2, 1983. In the paragraph detailing the reasons for the contempt citation, the court below stated:

> We find no explanation for failing to notify us immediately if there were considerations that would have legitimately prevented his complying with our Order of October 3 when notified thereof. *Id.*, at 674.

Obviously, a portion of the contempt holding was premised on Mr. Radigan not immediately filing an additional extension motion.

However, as noted in the show cause order, Mr. Radigan was informed that contempt was possible only if the brief was not timely filed. There was not an iota of notice that petitioner could be held in contempt for not immediately filing an extension motion. Such "a conviction upon a charge not made" is a denial of "constitutional due process." *Eaton* v. *Tulsa*, 415 U. S. 697, 94 S. Ct. 1228, 1229, 39 L. Ed. 2d 693 (1974).

As the prior discussion reveals, the notice provided by the October 3, 1983 order was, at best, vague and ambiguous. Such vagueness, however, is fatal to the ultimate finding that Mr. Radigan was in criminal contempt of the court below.

"The judicial contempt power is a potent weapon." *Internat'l Long. Assn.* v. *Philadelphia Mar. T. A.*, 389 U. S. 64, 88 S. Ct. 201, 208, 19 L. Ed. 2d 236 (1967). "When it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.*, 88 S. Ct. at 208. This Court there differentiated between "a violation of a court order by one who full understands its meaning but chooses to ignore its mandate" and "acts alleged to violate a decree that can only be described as unintelligible." *Id.*

"The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *Id.*, 88 S. Ct. at 208.

The procedural due process rights which attach to a contempt proceeding "include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In Re Oliver*, 333 U. S. 257, 68 S. Ct., 499, 507-08, 92 L. Ed. 2d 682 (1948). The only exception to this rule is where the act of misconduct occurs "in open court, in the presence of the judge." *Id.*, 68 S. Ct. at 509. *Taylor* v. *Hayes*, 413 U. S. 488, 94 S. Ct. 2697, 2702-2703, 41 L. E. 2d 897 (1974). Additionally, it has been long recognized that the Fifth Amendment privilege against self-incrimination applies to contempt hearings. *Gom-*

pers v. *Buck's Stove & Range Company*, 221 U. S. 418, 31 S. Ct. 492, 500, 55 L. Ed. 797 (1911).

The court below at the show cause hearing failed to comply with these minimal due process standards. Rather than acting under the presumption that Mr. Radigan had complied with the order of October 3, 1983, the court acted on the presumption that Mr. Radigan was in comtempt. The burden of proof was shifted to Mr. Radigan to *disprove* the contempt. Even though the court below made three pragraphs of "findings of facts" in its opinion and order, there were no witnesses presented on October 26, 1983 for Mr. Radigan to cross-examine.

Without any notice as to the criminal nature of the October 26th hearing, Mr. Radigan was not prepared to offer witnesses in his own behalf. Similarly, without any notice as to the criminal nature of the October 26th hearing, Mr. Radigan was not alerted to the fact that his statements to the court could be used against him. Even a cursory examination of the opinion and order of November 2, 1983 reveals that the court below used Mr. Radigan's explanation as the basis for finding him in contempt of court.

By no stretch of the imagination did the proceedings of October 25, 1983 comply with the mandate of *Oliver*.

In actuality, Mr. Radigan, without prior notice or warning, was given eight (8) days from Monday, October 3, 1983, until Tuesday, October 11, 1983, to file appellant's brief. When petitioner believed he could not meet this deadline, he on October 11, 1983,

filed a motion for extension, not of thirty days, but of ten days in which to file the *Herald* brief.

In the instant case, Mr. Radigan's motion for an extension of ten days to and including October 21, 1983, although filed on the last day of the previously granted extension period, was timely. While it is true that the court below in its opinion and order as well as at the show cause hearing indicated its dislike for extension motions filed on the last day of the extension period, there is no procedural rule or decision which prohibits the filing of such a motion on the last available date. Consequently, the filing of such a motion is neither improper nor untimely.

In the ultimate analysis, the filing of a procedurally correct motion for extension, advancing colorable "good cause" in support of the requested relief, cannot be construed as improper conduct constituting contempt of an order of the court. Mr. Radigan's reliance on a procedural rule of appellate practice, a *timely* extension motion, to inform the court below that he could not comply with the October 11, 1983 deadline was legally and ethically proper and correct.

It should be noted that in the instant case on October 31, 1983, the court granted Mr. Radigan's motion for a ten-day extension and ordered the appellant's brief in the *Herald* case filed as of that date (Order, 10-31-83). Thus, five days after the show cause hearing and three days prior to the issuance of the opinion and order holding Mr. Radigan in contempt, the court below by order directed that the tendered appellant's brief in *Herald* be filed. The Kentucky Supreme Court

was well aware of Mr. Radigan's "substantial compliance" with its order of October 3, 1983 when that court found him in contempt of court.

Since the uncontroverted evidence before the court below establishes both "substantial compliance" and a "good faith" effort to comply with the order of October 3, 1983, it was a denial of due process under the federal constitution to find Mr. Radigan in contempt.

According to the court below, the brief filed in the Joseph Herald case "is a brief that should have taken ten days to prepare". *Id.*, at 674. In the words of the court, "ten days . . . [was] the appropriate time [for preparing the brief] in the first place". *Id.*, at 674. These statements are contained in a portion of the opinion which is designated as factual findings.

Since by the court's own findings, Mr. Radigan needed at the minimum ten days to prepare the appellant's brief in the *Herald* case, it was physically impossible for him to comply with the order of October 3, 1983 which gave him only *eight days* to complete that brief and file it by October 11, 1983. Under any reading of the opinion and order, Mr. Radigan would still have breached the October 11, 1983 deadline by requesting a two-day extension of time to file the brief in question.

"In a civil contempt proceeding . . . , of course, a defendant may assert a *present* inability to comply with the order in question." *United States* v. *Rylander*, 103 S. Ct. 1548, 1552 (1983); emphasis in original. "While the court is bound by the enforcement order,

it will not be blind to evidence that compliance is now factually impossible." *Id.* "Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action." *Id.*, "It is settled, however, that in raising this defense, the defendant has the burden of production." *Id. See Hardin* v. *Summitt,* Ky., 627 S. W. 2d 580, 582 (1982).

Mr. Radigan raised his present inability to comply for the court's consideration when he filed a timely motion for a ten-day extension to and including October 21, 1983.

"Ordinarily, one charged with contempt of court for failure to comply with an order makes a complete defense by proving that he is unable to comply." *United States* v. *Bryan,* 339 U. S. 323, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950).

Mr. Radigan's inability to comply with the deadline of October 11, 1983 was explained in both his ten-day extension request and in his testimony at the show cause hearing. In his motion filed October 11, 1983, Mr. Radigan explained that during the last thirty days he had "completed a brief which is scheduled to be filed with the Court of Appeals of Kentucky on Wednesday, October 13, 1983" (Motion for Extension (10-11-83), p. 1). At the show cause hearing, Mr. Radigan explained that during the eight days between October 3-11, 1983, he had elected to complete and file the appellant's brief in the Kentucky Court of Appeals. Parenthetically, it should be noted that this was the case of *Greene* v. *Commonwealth,* File No. 83-CA-1340-MR (Radigan's Affidavit, (11-14-83), p. 2).

At the show cause hearing, members of the court expressed displeasure that Mr. Radigan completed the Court of Appeals brief and requested a ten-day extension in the *Herald* case despite the existence of the show cause order.

Mr. Radigan was faced with an ethical and pragmatic dilemma. Based on the work he had already completed on the *Greene* appeal and the number of extensions already granted by the Court of Appeals in that case, Mr. Radigan estimated in his professional judgment that if he continued to work on that appeal he could file it within the extension period. On the other hand, were he to abandon the *Greene* appeal temporarily to work on the *Herald* appeal, he quite possibly would fail to complete *Herald* by October 11, 1983 and also, by choice, fail to complete the *Greene* appeal. As a result both Greene and Herald could face dismissal of their appeals with lengthy delays during collateral actions to restore those appeals. Additionally, Mr. Radigan could face censure to *two* appellate courts for his handling of these two appeals.

Under these circumstances, Mr. Radigan's election to complete the *Greene* brief so it could be timely filed and to request an extension of only ten more days in *Herald* was not a contemptuous disregard of the order, but rather a considered professional judgment under difficult circumstances.

This Court has recognized that "criminal contempt is a crime in every fundamental respect." *Bloom* v. *State of Illinois,* 391 U. S. 194, 88 S. Ct. 1477, 1482, 20 L. Ed. 2d 522 (1968). "[C]onvictions for criminal

contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same." *Id.*, 88 S. Ct. at 1482.

The Kentucky court made *no finding* that the evidence of record established, beyond a reasonable doubt, that Mr. Radigan "wilfully desregarded or disobeyed" its order to complete the appellant's brief in *Herald* within eight days—on or before November 11, 1983.

"Significantly inadequate responses," "no acceptable excuses, and "grossly inadequate explanations" by Mr. Radigan at the snow cause hearing do not translate into "wilfull desregard or disobedience" of the court's order, particularly where Mr. Radigan filed a timely motion for a ten-day extension and then tendered the completed brief before the expiration of that ten-day period.

Mr. Radigan's "behavior may have been, to some degree, irritating to the court," but "his conduct" did not rise "the the level of wilful obstruction of the orderly administration of justice or flagrant disrespect for the court so as to sustain a conviction for criminal contempt." *Matter of Schwartz,* D.C., 391 A. 2d 278, 282 (1978).

In any event, there was no evidence before the court below to counter any of Mr. Radigan's assertions both in his motions for extension and at the show cause hearings regarding his workload or his professional judgments in these matters. The record at bar contains no relevant evidence as to the crucial element of criminal contempt, that is, "a wilfull disregard or disobedience" of the court's order.

On the basis of the evidence of record, no rational trier of fact could find beyond a reasonable doubt that Mr. Radigan's conduct in the instant case was wilfull disregard or disobedience of the court's order. *Harris* v. *United States,* 404 U. S. 1232, 92 S. Ct. 10, 12, 30 L. Ed. 2d 25 (1971); *see Vachon* v. *New Hampshire,* 414 U. S. 478, 94 S. Ct. 664, 665, 38 L. Ed. 2d 666 (1974). *Jackson* v. *Virginia,* 443 U. S. 307, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

A person tried for contempt of court has a right to an impartial judge, one who is not so involved in the controversy that he would be "unlikely to maintain that calm detachment necessary for fair adjudication." *Taylor* v. *Hayes,* 418 U. S. 488, 94 S. Ct. 2697, 2704, 41 L. Ed. 2d 897 (1974).

In fact, "it is generally wise" for a judge "to ask a fellow judge to take his place" in presiding over a contempt proceeding. *Mayberry* v. *Pennsylvania,* 400 U. S. 455, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971).

The failure of the Kentucky Supreme Court to recuse itself from Mr. Radigan's contempt proceedings violated his federal constitutional right to a fair trial.

In its opinion and order, the Court below determined that William M. Radigan was in contempt of court and imposed a fine of $100. However, "[i]n consideration of this being the first conviction, payment of the fine is suspended subject to further conduct". *Id.,* at 674. There was no mention of either the length of the suspension, or the terms and conditions of the suspension.

"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida,* 430 U. S. 349, 97 S. Ct. 1197, 1205, 51 L. Ed. 2d 393 (1977). Yet, in the case at bar, Mr. Radigan faces an indefinite suspension of the fine without any specified conditions. These vague and ambiguous conditions violate federal due process at the sentencing stage.

These conflicts justify the grant of certiorari to review the judgment below.

II. The Decision Below Holding the Petitioner, An Appellate Public Defender, In Contempt of Court for Failure to File a Client's Brief by a Certain Date, Even After He Had By Timely Motion Requested an Extension to File the Brief Within the Requested Period, Raises a Federal Constitutional Question of Importance to the Administration of Criminal Justice.

"A court must exercise '[t]he least possible power adequate to the end proposed'." *Shillitani* v. *United States,* 384 U. S. 364, 86 S. Ct. 1531, 1536, 16 L. Ed. 2d 622 (1966).

"This doctrine . . . requires that the trial judge first consider the feasibility of coercing testimony [for example,] through the imposition of civil contempt." *Id.,* 86 S. Ct. at 1536 n. 9. "The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Id.*

The doctrine of the exercise of the least judicial power to the end proposed has equal application to original actions, such as contempt proceedings, by an appellate court.

In holding Mr. Radigan in contempt of court for failure to file the *Herald* brief on October 11, 1983, the Supreme Court of Kentucky sent a very definite message to the members of the Bar—even though the court below will not dismiss a criminal appeal, if the attorneys do not comply with the orders of the court to file the brief on a certain date, then the attorneys will be penalized by contempt proceedings. Such a result is contrary to the purpose of a contempt action and casts a chilling effect on effective representation by appellate attorneys.

"The power to punish contemptuous conduct is essential to the preservation of the dignity and authority of [this nation's] courts." *In Re Masinter,* La., 355 So. 2d 1288, 1290 (1978). "This power, however, must be used with great care so as not to obstruct the advancement of causes before the court." *Id.,* at 1291.

Appellate courts should "hesitate to take disciplinary actions" unless obviously warranted because the courts must remain "sensitive to even the slightest possibility of casting an inhibitory shadow upon the ardor of those who practice before" them. *In Re Bithoney,* 486 F. 2d 319, 323 (1st Cir. 1973).

Courts should use the ability to punish through contempt sparingly. "This is particularly true in contempt case against lawyers, where there must be limited interference with their right to properly represent their clients." *Matter of Schwartz,* D.C., 391 A. 2d 278, 281 (1978).

"In contempt cases against lawyers the evidence must be carefully scrutinized in order to insure that there is no undue interference with the attorney-client relationship." *In Re Marshall,* 423 F. 2d 1130 (5th Cir. 1970), citing *United States* v. *Schiffer,* 351 F. 2d 91, 94 (6th Cir. 1965). *See People* v. *Kurz,* 35 Mich. App. 643, 192 N. W. 2d 594, 598 (1972).

The facts of the case at bar reflect the possibility of such a chilling effect on zealous advocacy. At the October 26, 1983 hearing, Mr. Radigan explained to the court below that from October 3 until October 11 he was working on the appellant's brief in the case of *Greene* v. *Commonwealth* which was pending before the Court of Appeals on a "final extension." If Mr. Radigan had stopped working on the *Greene* case in an attempt to prepare the pleadings in *Herald,* he felt that he was in danger of having *Greene* dismissed. However, the court below at the October 26th hearing severely citicized Mr. Radigan's professional and good faith judgment of priorities. In effect, the court told Mr. Radigan that he should have placed the *Greene* case in possible jeopardy and made a possibly futile attempt to complete *Herald.* In other words, Mr. Radigan should have sacrificed *Greene* for *Herald.*

In *In re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 424 (1962), this Court held that while it is necessary that a judge have the power to protect himself from actual obstruction in the courtroom, "it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their client's cases."

Appellate counsel, whether retained or appointed, should not fear that requests for extensions to insure a complete and adequate appellate presentation will be translated into retaliatory contempt sanctions against them.

This important constitutional question in the administration of criminal justice justifies the grant of certiorari to review the decision below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the Supreme Court of Kentucky entered on November 2, 1983.

Respectfully submitted,

J. Vincent Aprile II by cmb

J. VINCENT APRILE II
Attorney at Law
2520 Meadow Road
Louisville, Kentucky 40205
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, J. Vincent Aprile II, counsel for petitioner, hereby certify that forty (40) copies of the foregoing Petition for Writ of Certiorari was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and three (3) copies to John Scott, Clerk, Kentucky Supreme Court, Capitol Building, Frankfort, Kentucky 40601, and three (3) copies to Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601, this 21st day of March, 1984, by personally depositing same in a United States mail box, first-class postage prepaid. I further certify that all parties required to be served have been served.

J. Vincent Aprile II by cmr

J. Vincent Aprile
Attorney at Law
2520 Meadow Road
Louisville, Kentucky 40205
Counsel for Petitioner

APPENDIX

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER

Appellant's motion for an extension of time is granted. Appellant shall file his brief and perfect the appeal in the above-styled action on or before October 11, 1983.

If appellant's brief is not filed on or before October 11, 1983, counsel for the appellant shall appear before this court on October 24, 1983, at 10:30 a.m., in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief.

Stephenson, Vance, Wintersheimer and Aker, JJ., sitting. All concur.

ENTERED October 3, 1983.

(s) Robert F. Stephens
Chief Justice

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

83-SC-866-I

IN RE: WILLIAM M. RADIGAN, *Attorney*

OPINION and ORDER—Entered November 2, 1983

On October 3, 1983, by Order of the Supreme Court of Kentucky, in case #83-SC-552-I, styled *Joseph Herald* v. *Commonwealth of Kentucky*, this Court granted appellant's motion for an extension of time to October 11, 1983, to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed on or before October 11, 1983, counsel for the appellant shall appear before this court . . . in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief."

Appellant's counsel, William M. Radigan, failed to comply with this Order, and a hearing was held on October 26, 1983, at which time Mr. Radigan appeared and offered explanation.

We find the following facts to be true:

The transcript of evidence was filed on June 10, 1983. Thereafter on three occasions on or about the day the brief was due the appellant failed to file but instead filed an affidavit, notice and motion for another thirty days extension. In each case the allegations of Mr. Radigan's affidavits are markedly similar. In each case in paragraph 5 they recite that "This motion is made in good faith and not for the rea-

son of delay." But for the most part the six paragraphs of allegations in each affidavit parrot the preceding affidavit chapter and verse except for small differences in the first paragraph. In sum they indicate counsel is reasonably busy, and nothing further.

The practice prevalent in criminal cases of counsel routinely seeking multiple extensions has become a serious problem which this Court must consider in discharge of its administrative responsibilities.

At the oral hearing conducted October 26, 1983, Mr. Radigan advised this Court that he looked at the record in this case for the first time on the last day of the third extension. In spite of a pending show cause order he intentionally chose to work on other matters.

At that point Mr. Radigan determined that the record could be read and the necessary briefing accomplished in ten days. Once more he moved this Court on the last day for filing his statement of appeal and brief, for yet another extension—this time for ten days, the appropriate time in the first place.

Mr. Radigan is an experienced attorney with the Office of Public Advocacy. As such he is aware that should this Court refuse to permit such extension of time, however unreasonable, and dismiss appeals for failure to timely file statement of appeal and brief, thus effectively barring his client's appeal through his own misconduct, the person thus deprived of an appeal could seek further remedy in Federal Court in habeas corpus proceedings.

As the Court charged with responsibility for the orderly administration of justice in this state we cannot tolerate counsel deciding when it is timely and appropriate for a brief to be filed, assuming power to act with impunity because of the problems in the administration of criminal justice that would otherwise result from a dismissal of the appeal.

When Mr. Radigan appeared in response to the Order of this Court to show cause, his response was significantly inadequate. The brief which he has filed in the Joseph Herald case shows that it is a relatively simple case with few issues, all of a routine nature. As he has admitted and demonstrated, it is a brief that should have taken ten days to prepare, filed 133 days after the transcript of evidence was filed.

We find no acceptable excuse for beginning work on this case on October 11, 1983. We further find that Mr. Radigan is in contempt of the Order of this Court entered October 3, 1983, requiring him to file his brief on or before October 11, 1983 or appear to show cause why he should not he held in contempt for failure to do so. We find his explanation as to other work and projects occupying his time during the period in question grossly inadequate. We find no explanation for failing to notify us immediately if there were considerations that would legitimately have prevented his complying with our Order of October 3 when notified thereof.

Being duly advised, it is the Order of this Court that said William Radigan is found in contempt of Court and fined $100 for his contempt.

In consideration of this being the first conviction, payment of the fine is suspended subject to further conduct.

Stephens, C.J., Gant, Leibson, Stephenson and Wintersheimer, JJ., concurring.

ENTERED November 2, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

83-SC-866-I

IN RE: WILLIAM M. RADIGAN, *Attorney*

ORDER—Entered November 17, 1983

The motion to vacate the opinion and order of this Court herein, entered November 2, 1983, and to rehear this matter, is denied.

Entire Court sitting.

All concur.

ENTERED November 17, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

83-SC-866-I

IN RE: WILLIAM M. RADIGAN, *Attorney*

In Supreme Court

ORDER DENYING MOTION TO RECONSIDER—
Entered December 22, 1983

William M. Radigan's motion to reconsider is denied.

All concur.

ENTERED December 22, 1983.

(s) Robert F. Stephens
Chief Justice

AFFIDAVIT OF WILLIAM M. RADIGAN

Comes now the affiant, William M. Radigan, and having been duly sworn, states as follows:

1. The affiant is the appointed appellate counsel in the case of *Herald* v. *Commonwealth,* File No. 83-SC-552-MR.

2. The affiant is additionally the named individual in the Opinion and Order entered by this Court in *In Re: William M. Radigan, Attorney,* File No. 83-SC-866-I.

3. From June 10, 1983, when the record of appeal in *Herald* was filed with this Court,[1] until October 31, 1983, when the *Herald* brief was ordered to be filed, the affiant, acting as assigned counsel, has filed a total of three hundred and five (305) pages of appellate pleadings. These include:

(1) June 17, 1983: *Meredith* v. *Commonwealth,* File No. 83-SC-122-MR (original brief, 4 issues, 29 pages);

(2) June 27, 1983: *Trent* v. *Commonwealth,* File No. 83-CA-470-MR (original brief, 1 issue, 19 pages);

(3) July 11, 1983: *Crick* v. *Smith,* United States Court of Appeals for the Sixth Circuit (original brief, 2 issues, 36 pages);

(4) July 25, 1983: *Conover* v. *Commonwealth,* File No. 83-CA-594-MR (original brief, 1 issue, 7 pages);

(5) August 3, 1983: *Moore* v. *Oldham,* File No. 83-CA-877-OA (Mandamus action, 8 pages);

(6) August 16, 1983: *Meredith* v. *Commonwealth,* File No. 83-SC-122-MR (Reply brief, 4 issues, 5 pages);

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[1]Even though the affiant was not assigned the *Herald* case until *July* 5, 1983, this Court in the Opinion and Order in *Radigan* calculated the time from June 10, 1983. The affiant will follow this Court's lead and review his caseload from that date.

(7) August 18, 1983: *Presley* v. *Rees,* United States District Court for the Eastern District of Kentucky (petition for writ of habeas corpus, 1 issue, 27 pages);

(8) August 19, 1983: *Harston* v. *Parke,* United States District Court for the Western District of Kentucky (petition for writ of habeas corpus, 2 issues, 44 pages);

(9) September 7, 1983: *Harris* v. *Commonwealth,* File No. 83-SC-409-MR (original brief, 3 issues, 32 pages);

(10) September 8, 1983: *Moore* v. *Oldham,* File No. 83-CA-1967-OA (mandamus action, 17 pages);

(11) September 28, 1983: *Crick* v. *Smith,* United States Court of Appeals for the Sixth Circuit (reply brief, 2 issues, 10 pages);

(12) October 13, 1983: *Greene* v. *Commonwealth,* File No. 83-CA-1340-MR (original brief, 4 issues, 29 pages);

(13) October 17, 1983: *Ringo* v. *Commonwealth* (discretionary review, 7 pages);

(14) October 21, 1983: *Herald* v. *Commonwealth,* File No. 83-SC-552-MR (original brief tendered, 3 issues, 25 pages);

(15) October 28, 1983: *Buchanan* v. *Commonwealth,* File No. 83-SC-257-MR (reply brief, 3 issues, 5 pages):

(16) October 31, 1983: *Harris* v. *Commonwealth,* File No. 83-SC-409-MR (reply brief, 3 issues, 5 pages).

4. From June 10, 1983, through October 31, 1983, the affiant has had five (5) oral arguments in the state and federal appellate courts. These include:

(1) June 30, 1983: *Lucey* v. *Seabolt,* United States Court of Appeals for the Sixth Circuit;

(2) July 5, 1983; *Wine* v. *Commonwealth,* Court of Appeals of Kentucky;

(3) September 15, 1983: *Riggsbee and Jackson* v. *Commonwealth,* Supreme Court of Kentucky;

(4) October 4, 1983: *Gay* v. *Commonwealth,* Court of Appeals of Kentucky;

(5) October 27, 1983: *Hibbard* v. *Commonwealth,* Supreme Court of Kentucky.

5. From June 10, 1983, through October 31, 1983, the affiant has been involved in the preparation of a retrial in the case of *Commonwealth* v. *Brian Keith Moore,* Jefferson Circuit Court, a death penalty case. During this period, the affiant has been involved in the following matters:

(1) June 15, 1983: investigation and trial preparation;

(2) June 17, 1983: investigation and trial preparation;

(3) June 20, 1983: motion hour;

(4) June 22, 1983: investigation and trial preparation;

(5) June 27, 1983: motion hour;

(6) June 30, 1983: investigation and trial preparation;

(7) July 5, 1983: investigation and trial preparation;

(8) July 11, 1983: motion hour;

(9) July 13, 1983: investigation and trial preparation;

(10) July 18, 1983: investigation and trial preparation;

(11) July 20, 1983: investigation and trial preparation;

(12) July 27, 1983: investigation and trial preparation;

(13) August 22, 1983: motion hour;

(14) August 23, 1983: investigation and trial preparation;

(15) August 24, 1983: investigation and trial preparation;

(16) August 25, 1983: investigation and trial preparation;

(17) August 26, 1983: evidentiary hearing;

(18) September 16, 1983: investigation and trial preparation;

(19) September 30, 1983: evidentiary hearing;

(20) October 21, 1983: investigation and trial preparation.

6. From June 10, 1983, through October 12, 1983, the affiant was actively involved as defense counsel in the case of *Commonwealth* v. *Everett Wayne Bishop*, a retrial of a robbery conviction in the Jefferson Circuit Court. During this period, the affiant was involved in the following matters:

(1) June 20, 1983: motion hour;

(2) July 13, 1983: investigation and trial preparation;

(3) July 20, 1983: investigation and trial preparation;

(4) July 25, 1983: motion hour;

(5) August 3, 1983: investigation and trial preparation;

(6) October 12, 1983: guilty plea to lesser-included offense for time served.

7. From June 10, 1983, through September 20, 1983, the affiant was actively involved as defense counsel in the case of *Commonwealth* v. *Calvin Ray Smith*, a retrial of a manslaughter conviction in the Clay Circuit Court. During this period, the affiant was involved in the following matters:

(1) August 22, 1983: investigation and trial preparation;

(2) September 13, 1983: deposition, investigation and trial preparation;

(3) September 15, 1983: trial preparation and preparation of motions;
(4) September 16, 1983: trial preparation and preparation of motions;
(5) September 19-20, 1983: motion hour, evidentiary hearing, continuance until January 25, 1984.

8. During October of 1983, the affiant has been actively involved as counsel for the plaintiffs in the case of *Turner, et al.* v. *Stumbo,* a civil rights action in the United States District Court for the Western District of Kentucky, on remand from the Sixth Circuit. The affiant has been involved in the following matters:

(1) October 6, 1983: investigation and preparation for hearing;
(2) October 11, 1983: investigation and preparation for hearing;
(3) October 18, 1983: investigation and preparation for hearing;
(4) October 21, 1983: investigation and preparation for hearing; preparation of pleadings;
(5) October 23, 1983: investigation and preparation for hearings;
(6) October 24, 1983: preparation of pleadings;
(7) October 25, 1983: hearing, case set for trial on merits on November 22-23, 1983.

(s) William M. Radigan
William M. Radigan, Affiant

Subscribed and sworn to before me by William M. Radigan this 14th day of November, 1983.

(s) Joyce L. Gayles
Notary Public State at Large

My Commission Expires: September 20, 1987

AFFIDAVIT OF MARK A. POSNANSKY

Comes the affiant, Mark A. Posnansky, and after first being duly sworn, states as follows:

That I am the Manager of the Appellate Branch of the Department of Public Advocacy in Frankfort, Kentucky, and, that as such, one of my responsibilities is to assign appeals to the attorneys in the Appellate Branch for briefing.

That I assigned the case to Joseph Herald, an appeal from the Campbell Circuit Court, to William M. Radigan. The Department of Public Advocacy was notified by the Kentucky Supreme Court that the record in said case had been received on June 10, 1983. The Brief For Appellant, therefore, was due to be filed on July 10, 1983.

That the appeal was not assigned to William M. Radigan until July 5, 1983. The reasons that the assignment was not made until that date are as follows:

1. For several years the Department of Public Advocacy has been assigning some of its cases outside of the central office under the "of counsel" plan. This is due to the fact that the staff in the central office is not large enough to absorb all of the appeals coming into the office. A conscious and deliberate decision was made, at the time these appeals started being assigned outside of the office, to assign only cases with a sentence of under ten (10) years. The reason for this decision was the belief that the experience and expertise of the central office attorneys dictated that they should handle the more serious criminal cases.

2. Due to the increasing number of appeals coming into the office, and due to the fact that the size of the central office has remained stationary by order of the Executive Branch of the Commonwealth of Kentucky, it has become necessary to assign some cases outside of the office where

the sentence is greater than ten (10) years. But the policy has always remained that, if at all possible, sentences of twenty (20) years or over should remain in the central office. As Manager of this Branch, I have tried to adhere to this policy.

3. The attorneys in the Appellate Branch of the Department of Public Advocacy are currently carrying a caseload of twenty-four (24) appeals per year. That is the maximum allowable amount under the National Legal Aid and Defended Association Standards. In order to equitably assign these twenty-four (24) appeals per year, the affiant assigns them at the rate of two (2) cases per month to each attorney.

4. The Court should be aware that the number of new appeals coming into the central office is increasing at a record pace. During fiscal year 1983 (July 1, 1982 - June 30, 1983), the Department of Public Advocacy received an average of 43.7 new appeals per month. The figure for the previous fiscal year was an average of approximately 29 new appeals per month.

5. During this same period of time, the number of attorneys in the Appellate Branch of the central office has not only failed to increase, it has decreased by one (1). That attorney, Neal Walker, resigned in March, 1983. Due to the hiring freeze which has continuously been in effect in state government, the Department has not been able to fill this position. This has resulted in an even greater burden on the attorneys in the central office.

6. The Joseph Herald case was assigned to Mr. Radigan on July 5, 1983. The record had been received by the Supreme Court on June 10, 1983. But because the number of appeals to be assigned at that time was so large, all of the June assignments were made to attorneys in the central office *on June 1, 1983.* On that date, affiant depleted his

entire month's assignments. Affiant was therefore not in a position to assign the Herald case when it came in.

7. Because the Joseph Herald appeal was an appeal to the Kentucky Supreme Court, and because of this office's policy of assigning Supreme Court cases to "in-house" attorneys, it was necessary to hold the Herald case until July. Affiant assigned the Joseph Herald appeal to William M. Radigan on July 5, 1983. That was the first working day for attorneys in the central office during the month of July.

8. Affiant can state to this Court with certainty that the assignment would have been made much earlier had there been anyone in the central office to assign the case to. But since the policy of this office is to assign two (2) cases per month, and since the policy of this office is to assign Supreme Court cases to "in-house" attorneys, and since the June assignments had been exhausted by June 1, affiant had no choice but to wait until July 5 to make this assignment.

Further affiant saith not.

(s) Mark A. Posnansky
Mark A. Posnansky
Assistant Public Advocate
Appellate Branch Manager

Subscribed and sworn to before me by Mark A. Posnansky on this 14th day of November, 1983.

My Commission Expires: August 31, 1986

(s) Kathy D. Collins
Notary Public - State at Large

No. 83-1571

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM M. RADIGAN - - - - Petitioner

versus

SUPREME COURT OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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April 20, 1984

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1571

WILLIAM M. RADIGAN - - - - *Petitioner*

v.

SUPREME COURT OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Respondent, Supreme Court of Kentucky, prays that the Court will deny the petition for a writ of certiorari to review the opinion and order of Respondent entered in this proceeding on November 2, 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those constitutional provisions previously set forth by Petitioner, the following provisions of the Constitution of the Commonwealth of Kentucky are also involved.

Section 109 of the Kentucky Constitution provides, in relevant part, as follows:

> The judicial power of the commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known

as the Circuit Court and a trial court of limited jurisdiction known as the District Court.

Section 115 of the Kentucky Constitution provides, in relevant part, as follows:

> Procedural rules shall provide for expeditious and inexpensive appeals.

Section 116 of the Kentucky Constitution provides, in relevant part, as follows:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, . . . and rules of practice and procedure for the Court of Justice.

COUNTERSTATEMENT OF THE CASE

While the factual account of the events leading up to this present controversy is for the most part correct as supplied by Petitioner, there are some very crucial inaccuracies which must be corrected. For the purpose of clarifying the events at the October 26, 1983, show cause hearing before the Supreme Court of Kentucky, a transcript of that hearing is provided in the appendix to this brief. (Hereinafter cited as "T.R. ——") This show cause hearing was necessitated by Petitioner's failure to file a brief at the end of his *third* extension of time in which to file, Petitioner having had two extensions of time prior to the one which was granted subject to an order to show cause if the brief was not then filed.

Both in his statement of the case and in his arguments, Petitioner attempts to paint himself as having

been caught on the horns of a dilemma from which there was no escape. He states that he was under *both* the show cause order of the Kentucky Supreme Court and "a similar order from the Kentucky Court of Appeals". (Petition, p. 5) In actuality, Petitioner was under only one show cause order, that one issued by Respondent Supreme Court of Kentucky. This Petitioner admitted in oral argument at the show cause hearing (T.R., p. 4, response to question by Justice Wintersheimer) and is reflected by the Kentucky Court of Appeals order to which he referred (see, order of the Kentucky Court of Appeals entered 9/7/83 in the case of *Green* v. *Commonwealth,* Appendix, p. 50). In point of fact, Petitioner had briefs due in both the Court of Appeals and the Kentucky Supreme Court, yet he chose to ignore the latter in order to complete work on the former. Even past that, the record in the Court of Appeals reflects that Petitioner was given still another extension for the filing of the brief which he says he chose to complete rather than working on *Herald* as per the order of the Supreme Court. (Court of Appeals, Order of 10/31/83, Appendix, p. 51) Indeed, in the course of oral argument before the Supreme Court, Petitioner stated that he did not even begin to work on the *Herald* case (the matter then pending before the Kentucky Supreme Court) until the date on which his Supreme Court brief was required by the show cause order to be filed. (T.R. 6, response to question by Justice Vance) Thereafter, he completed work in only ten days on the *Herald* brief and he filed it 103 days after it was initially due.

Having thus portrayed himself factually as an innocent caught in a web of circumstances from which he could not extract himself, Petitioner proceeds in his statement of the case to allege some eleven respects—two more than in his list of "questions presented" — in which the Supreme Court of Kentucky has denied him due process of law, both substantive and procedural, as viewed from every direction conceivable. While asserting that these myriad due process violations (including every aspect known to modern constitutional law, with the possible exception of pre-judgment attachment without notice) were asserted in a timely fashion, Petitioner significantly omits to state that not one of these objections was raised before or at the show cause hearing but that all were first raised by Petitioner in his motion to reconsider. With such a plethora of constitutional rights in the hands of one obviously experienced in criminal advocacy, it is difficult to envision why none were earlier raised.

Factually, one cannot but be amazed at these current proceedings. Petitioner has, by his own version, found himself caught up in terrible time constraints by the pressures of his position at the Office of Public Advocacy and the conflict of those time pressures with the procedural rules formulated by the Kentucky Supreme Court. Although his statement of the case alludes to such employment, it omits to state that he is no longer so employed; thus another tangle like the current one seems highly unlikely for Petitioner. Despite that fact, Petitioner continues to assert before this Court these purported constitutional issues, all in the

context of a punishment by fine of one hundred dollars, even which small amount was suspended. If all of this is to survive summary dismissal under the doctrine of *de minimum non curat lex,* then there must be some more substantial controversy lurking here than meets the eye. Indeed, there are other issues, all of which point to the conclusion that this Court should deny the petition for the writ of certiorari.

SUMMARY OF ARGUMENT

I. *The petition for writ of certiorari should be denied because it was an appropriate exercise of the contempt power by the Supreme Court of Kentucky.* Petitioner has placed himself in a position in which he almost asked deliberately to be held in contempt of court. His actions have undermined the Supreme Court of Kentucky's ability and duty, as manifested in the Constitution of the Commonwealth of Kentucky, to control the appellate processes of the state. Petitioner's efforts have been at the expense of his client, who languished in jail while his appeal was delayed. For those reasons, Petitioner was quite rightly held in contempt of court by the Supreme Court of Kentucky.

II. *The petition for a writ of certiorari should be denied because it is sought on frivolous grounds.* It is the contention of the Supreme Court of Kentucky that Petitioner has not sought the writ of certiorari to vindicate any violation of his constitutional rights but rather to subvert the ability of the Kentucky court system to control the flow of appeals being prosecuted by publicly funded counsel. Petitioner apparently

seeks to obtain relief in this proceeding so that it can be combined with the Sixth Circuit holding in *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir., 1980). The net result of the two proceedings, should the outcome be favorable to Petitioner, would be to leave the Kentucky Supreme Court either unable to force the expeditious treatment of appeals on its docket or to embroil it in a controversy with the executive and legislative branches of state government.

III. *The petition for a writ of certiorari should be denied because none of the due process rights of Petitioner were violated by Respondent in holding him in contempt of court.* Every aspect of procedural fairness was observed by the Supreme Court of Kentucky in adjudging Petitioner guilty of criminal contempt of court. He was given fair notice that he might be held in contempt. With the matter governed by state law and the penalty being only $100, the distinction between criminal and civil contempt is constitutionally irrelevant, although any reasonable practitioner would have perceived that the contemplated contempt was criminal in nature. Petitioner was given a full and fair opportunity to defend himself before an impartial tribunal and the decision therein is based upon substantial and credible evidence.

REASONS FOR DENIAL OF THE WRIT

I. The Holding of Petitioner in Criminal Contempt was an Appropriate Exercise of the Contempt Power by the Supreme Court of Kentucky.

It was the duty of the Supreme Court of Kentucky to see that the claims of indigents were processed

promptly so that persons with meritorious appeals would not languish in jail due to the derelictions of their counsel. The normal, orderly process of the Court was blocked by the actions of Petitioner and it was exactly for that act that he was quite correctly adjudged in criminal contempt.

In the brief section of his argument addressed to the propriety of the exercise of the contempt power in this case by the Kentucky Supreme Court, Petitioner asserts that the exercise of the contempt power in this fact setting is an attempt by the Kentucky Supreme Court to interfere with the attorney-client relationship and to chill the zealous advocacy of all counsel. Petitioner states that his contempt conviction "sent a message" to the practicing Bar in Kentucky—the message being that the Kentucky Supreme Court would not dismiss criminal appeals for failure of a timely filing but that it would punish attorneys who did not comply with the orders of the Court to file briefs. Significantly lacking in both assertions by Petitioner is any mention of a federal constitutional ground which would invalidate the action taken by Respondent in punishing Petitioner for criminal contempt of the Kentucky Supreme Court. Whatever may be the restrictions applicable to the federal courts in disciplinary proceedings (*In Re Bithoney,* 486 F. 2d 319 [1st Cir., 1973]), Petitioner has not asserted any federal grounds which would prevent the Supreme Court of Kentucky from sanctioning *its* practitioners, through the contempt power, for disobeying the rules of the state.

In his latter assertion, however, there is more than a grain of truth; indeed, a message *was* sent to the practicing Bar and to Petitioner in particular, by the Kentucky Supreme Court. The message sent by the Kentucky Supreme Court was that there is an end to the patience of the Court and that *all* appeals must be processed in a speedy, expeditious fashion, in accordance with the rules and orders of the Court. It was a message deliberately sent and it is the position of the Kentucky Supreme Court that its action in sending such a message was not only justified but was absolutely necessary.

As will be set forth in more detail *infra*, the Supreme Court of Kentucky is faced with having to deal with "no-choice" motions when publicly provided defense counsel move for extension of time for the filing of their appellate briefs. The imposition of the federal requirement in *Cleaver, supra,* makes it wasteful of the time and efforts of all involved for the Kentucky court system to deny such motions and dismiss the appeals. Thus, the *only* control which is left to Kentucky in such cases is to apply sanctions against the attorneys who willfully refuse to follow the briefing schedules which the Kentucky Supreme Court is *required* by state law to impose.

Those lawyers who practice before the Supreme Court of the United States have little doubt as to how swift will be the punishment and how awesome will be the consequence for willful disobedience of the orders of this Court. The paucity of case law attests to the effectiveness of that certainty in controlling the proc-

esses of this Court. Even the President of the United States has shown obedience to the lawful orders of this Court rather tthan risking disobedience. *Nixon* v. *United States*, 418 U. S. 683 (1974). *This Court* would not tolerate for a moment the tactics which Petitioner has practiced before the Supreme Court of Kentucky. If this Court should deny to the Supreme Court of Kentucky the power to punish Petitioner for the contempt which he seems deliberately to have sought, then *this Court* will be sending a message to the practicing members of the Kentucky Bar and every other state bar in the United States. That message will be that in the publicly funded defense of criminal defendants, *there are no rules.* That message would be as applicable to federal proceedings as to state proceedings, to trial proceedings as to appellate proceedings, and to private defense as to publicly funded defense; there would then be no limit to the power which Petitioner and other like him would assert. There should be no mistake about it. This attack upon the contempt power of the Kentucky Supreme Court is a major attack upon the integrity of the judicial process by Petitioner and others similarly situated who seek to bend the rules of the system to their own ends. Surely this Court cannot leave the Supreme Court of Kentucky in such a position of helplessness against this attack; therefore, the Petition for Writ of Certiorari should be denied by the Court.

II. The Petition for the Writ Should Be Denied as Having Been Sought on Frivolous Grounds.

The currently pending petition for the writ of certiorari should be denied on the grounds, demonstrated *infra,* that the due process — contempt arguments are frivolous. Of even more importance to the maintenance of judicial integrity is that this proceeding is apparently pressed by Petitioner not to vindicate his due proces rights but rather to usurp the power of the Supreme Court of Kentucky to control the process of moving cases through the state's appellate structure. In Kentucky, the power to make rules applicable to such proceedings is vested by Section 116 of the Kentucky Constitution in the Supreme Court of Kentucky. Indeed, in regard to appellate proceedings, the Supreme Court of Kentucky is *required* to provide rules which will "provide for expeditious and inexpensive appeals". Ky. Const. §115. This is a power which has been held to be *exclusively* within the judicial power in Kentucky, excluding even interference by the Kentucky legislature. *Commonwealth* v. *Schumacher,* 566 S. W. 2d 762 (Ky. App., 1978) Indeed, it would be fair to say that this case is *not* about due process but in reality about a power struggle over control of the process of appellate advocacy in public counsel criminal cases.

The issue which lurks behind this case is that of effective assistance of counsel requirements for criminal appeals being handled by the Office of Public Advocacy. In regard to the situation in Kentucky, the leading federal case on point is *Cleaver* v. *Borden-*

kircher, 634 F. 2d 1010 (6th Cir., 1980). In that case, the Sixth Circuit upheld the issuance of a writ of *habeas corpus* to a prisoner whose appeal had been dismissed when his publicly supplied counsel was denied an extension of time in which to file an appeal brief. The holding was based upon the Sixth Circuit's conclusion that the Sixth Amendment right to counsel was denied when such extension was denied to an attorney whose caseload made it physically impossible for him to file in a timely fashion. In so doing, the Circuit relied upon *Anders* v. *California,* 386 U. S. 738 (1967) and *Douglas* v. *California,* 372 U. S. 353 (1963).

While Petitioner was acting as appellate counsel in the *Herald* case, he sought three thirty day extensions and one ten day extension of time in which to file his brief. In his motions for those extensions, Petitioner relied implicitly upon the Sixth Circuit holding in *Cleaver.* Indeed, the heart of his motions for extensions was a verbatim quote from the motion of the public defender involved in *Cleaver.* (See, motions in Appendix, pp. 52-54, 56-58, 60-62, 64-67, and *Cleaver, supra* at 1011) Thus, in filing his extension motions, Petitioner was stating that his motion *had* to be granted or his client would, under *Cleaver,* be denied effective assistance of counsel. As Justice Leibson of the Kentucky Supreme Court very aptly put it, the "motion" wasn't a "motion at all. (It was) an order because of . . . *Cleaver,* . . . we're in a position where we can't deny the motion . . . without, in essence, being a release order for the prisoners". (T.R. 26, remarks by Justice Leibson)

Now, with this petition for writ of certiorari, Petitioner has in effect "dropped the other shoe". The cloak of constitutional "questions" presented does not hide the substance of his ploy. With *Cleaver* already available as a pedestal, Petitioner asks this Court to hold, in effect, that counsel cannot be constitutionally penalized for failure to file, thereby elevating the Office of Public Advocacy beyond the reach of time constraints. According to this argument, *his client,* could not constitutionally be penalized for a failure to file, *Petitioner* could not constitutionally be penalized for a failure to file and, as if by magic, any time constraints upon Petitioner disappeared. Of even greater significance is that not only would time constraints disappear, the ability of the Supreme Court of Kentucky to regulate the state's inferior courts and the Supreme Court's own processes would similarly disappear. At stake in this case is no less than the question of whether the time periods for filing appeals for criminal indigents in the Kentucky court system will be controlled by the Kentucky Supreme Court or by the Petitioner and those similarly situated.

Indeed, there is no reason to think that the question is limited to time periods for filing appeals, for similar tactics would seem equally effective in such other matters as length of the appellate brief, length of time assigned for oral argument and most of the other rules of procedure applicable to the processing of appeals. Furthermore, there is no reason to suppose that the tactics here utilized are limited to the Kentucky court system or even to all the other state court systems in the United

States. Petitioner has already imported his tactics to *this* Court; viewing the case now as a review of a criminal conviction, Petitioner has requested and secured an extension of the time in which to file his petition for the writ of certiorari.

Assuming that what Petitioner really seeks in this proceeding is an ability to set his own time schedule for the filing of criminal appeal briefs for indigents, was there any alternative open to the Kentucky Supreme Court other than the holding of Petitioner in contempt? In his colloquy with the Kentucky Supreme Court about his dilemma of too heavy a caseload, Petitioner suggested that all this might be solved if his office had more attorneys and a larger budget. (T.R. p. 21, response to question by Justice Liebson) In support of his position, Petitioner has now submitted the affidavit of his supervisor, Mark A. Posnansky, which states in effect that his office has a growing caseload and is under a hiring freeze which prevented the replacement of attorneys who have left the office. Quite correctly seeing the end to which Petitioner was moving in this portion of the oral argument, Justice Stephenson of the Kentucky Supreme Court observed that the court had no power to secure for the Office of Public Advocacy any relief as to its budget or its staffing, stating that "We (the Supreme Court of Kentucky) have no control over that". (T.R. p. 21, remark by Justice Stephenson) The Petition for the writ of certiarari should be denied in this case because the petition is frivolous and a sham; it has been undertaken not to vindicate anyone's due process

rights but rather to attempt to secure the aid of the Court in coercing the Supreme Court of Kentucky into Petitioner's plan.

The Petitioner in this case appears deliberately to have put himself into a position in which the Supreme Court of Kentucky was forced to make a choice among three alternatives: (1) to give up on taking any action against Petitioner, which action when combined with *Cleaver* would leave the control of the Court's processes virtually in the hands of Petitioner and his colleagues. (2) to embroil itself into the processes of the executive and legislative branches of the Kentucky state government by *ordering* that the hiring freeze imposed by the Governor of the state not be applied to Petitioner's office and that the Kentucky General Assembly appropriate more money for that office; or (3) to hold Petitioner in contempt. It must be obvious that the abdication of control of the judicial process was an unacceptable alternative, not just for the Kentucky Supreme Court or any other state court, but for this Court as well. Neither was the second alternative appropriate to a state as firmly committed to the doctrine of separation of powers as is Kentucky, and it would seem equally unacceptable should the tactic be imported to the federal system. *See, Ex Parte Auditor of Public Accounts,* 609 S. W. 2d 682 (Ky., 1980) Thus, only the third alternative remained. It must be concluded that Petitioner deliberately put himself into the position to force that choice, that the choice came out the only way that *any* reasonable appellate court would have chosen and that Petitioner should not be now

allowed either to escape the fruits of his attempt or to foist those unacceptable alternatives onto the Kentucky Supreme Court through the help of this Court.

III. Petitioner Was Afforded Due Process of Law in the Proceeding Below Before the Supreme Court of Kentucky.

The ability of the Kentucky Supreme Court, both under state and federal law, to punish for contempt is well settled.

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently, to the due administration of justice". *Ex Parte Robinson,* 86 U. S. 506, 509 (1874).

"And such is the recognized doctrine in reference to the powers of the courts of the several States". *Ex Parte Terry,* 128 U. S. 298, 303 (1888). Similarly, it is well settled in both state and federal practice that such power is activated by the issuance of a "rule" or a "show cause order". *Ex Parte Robinson, supra,* utilized a show cause order in federal practice and the practice in Kentucky at least dates back to *In Re Woolley,* 74 Ky. 95 (1874), in which such procedure was utilized by the state's then highest court, the Court of Appeals. There are literally hundred of reported cases in the federal and state systems in the United States which have used the practice continuously since the founding of this country.

It is, however, worthwhile to keep in mind one very crucial difference between the state and federal systems as they relate to the contempt power. Despite the fact that many federal cases speak of the authority to punish for contempt as being inherent in the federal courts, there has long been federal legislation applicable to that contempt power. *See,* 18 U.S.C. 401. This federal statutory dimension, which is criminal in nature, probably explains in part the long search by this Court for a meaningful distinction between civil and criminal contempts. In the state of Kentucky, there is no legislation which applies any such limits or restrictions upon the contempt power of the judiciary. As a result of this, many of the federal cases cited by Petitioner will have no applicability to the question at hand. Often a federal case will apply a restrictive view of contempt, not because of any federal constitutional requirement but because of a federal statutory requirement. *See, e.g., In Re McConnell,* 370 U. S. 230 (1962) The effect of this will mean that only those United States Supreme Court decisions reviewing state contempt proceedings and those federal decisions based on federal constitutional requirements are here on point. In regard to that latter category, even those cases may be of limited authority given the possibility that the due process clause of the Fifth Amendment (which is the constitutional source in federal contempts) may not be exactly mirrored by the requirement of due process under the Fourteenth Amendment (which is the constitutional source in state contempts).

A. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PARTICIPATION IN THE DECISION BELOW OF JUDGES WHO ISSUED THE SHOW CAUSE ORDER.

In the current proceedings, Petitioner attempts to resurrect in federal guise his previously advanced state law argument that all the judges of the Kentucky Supreme Court who participated in the issuance of the show cause order were mandatorily disqualfied from sitting in judgment on the question of whether Petitioner was in contempt of that order for his admitted failure to file in the period set by the order. What Petitioner is attempting to suggest is that those judges had become so embroiled in the controversy that, as in the case of *Taylor* v. *Hayes,* 418 U. S. 488 (1974), they had lost the detachment necessary to rule fairly on the issue. To use the phrase long ago adopted by Mr. Justice Holmes speaking for this Court in *United States* v. *Shipp,* 203 U. S. 571, 574 (1906), Petitioner "has . . . suggested that the court is a party . . .". In there upholding the ability of the United States Supreme Court to pass on the question of whether there was contempt in violation of *its own order,* Mr. Justice Holmes stated:

> The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. *Id.*

It strains credibility to suggest that the current case resembles in any way those contempt cases in which

a trial court judge became embroiled in a controversy with trial counsel so that the securing of another judge to pass on the contempt was necessary. It was under that fact setting that this Court found the usage of a separate judge necessary in *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971). To apply that rule to the current facts would be a quantum leap forward in the law and one which would be ill-advised. Mr. Justice Holmes long ago rejected the notion that this Court could be so deprived of its power and there is not the slightest reason to change that position now; by the same token, this Court should not deny to the Supreme Court of Kentucky that same power to control its own integrity.

B. PETITIONER'S DUE PROCEES RIGHTS WERE NOT VIOLATED BY HIS HAVING BEEN HELD IN CRIMINAL CONTEMPT RATHER THAN CIVIL CONTEMPT BY RESPONDENT.

Petitioner professes to have been denied his due process rights because, he says, the show cause order did not specify that he might be held in criminal contempt for its violation. Even if the distinction between civil and criminal contempt is meaningful, neither Petitioner nor any other practicing attorney could reasonably have had *any* doubt that the contempt which was contemplated was criminal. In the first place, the show cause order clearly states that counsel will be required to show cause why *he* (counsel) should not he held in contempt. An attorney given notice that *he* might be held in contempt should have little doubt that it is criminal contempt, because civil contempts

against lawyers are relatively rare. *See, e.g., Hickman* v. *Taylor,* 329 U. S. 495 (1947).

Even without the red flag of a personal warning, still a practicing attorney should have recognized the criminal nature of the impending proceedings. In Kentucky, as in every other American state and in the federal practice, the theoretical distinction between the two is easily seen:

> Civil contempts are those quasi contempts which consist in failure to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court, while criminal contempts are all acts in disrespect of the court or its process which obstruct the administration of justice, or tend to bring the court into disrepute. *Jones* v. *Commonwealth,* 308 Ky. 233, 213 S. W. 2d 983, 985 (Ky., 1948).

In these facts, a reasonable practicing attorney would realize that civil contempt was an impossibility. The production of a brief by Petitioner was *not* to the advantage of the other party, the Commonwealth. Petitioner's client was in jail serving his sentence and the filing of a brief was in no way advantageous to the Commonwealth; indeed it was only a *filing* which could be *dis*advantageous to the Commonwealth. In actuality, the only *party* to the action who could possibly benefit from the Court's order was Joseph Herald, Petitioner's client. Certainly, the Commonwealth was not to be aided by Petitioner's filing in the same sense that the United States would have been aided by the

grand jury testimony of the alleged contemnor in *Shillitani* v. *United States*, 384 U. S. 364 (1966). On the other hand, the continued failure of Petitioner to file his brief was certainly an abuse of the rules and procedures of the Kentucky Supreme Court.

Even if it were assumed that a practicing attorney of Petitioner's experience could not tell from the face of the show cause order that criminal contempt was contemplated, there should be absolutely no doubt as to the nature of the proceeding when he appeared in the Kentucky Supreme Court on October 26, 1983. At that time, his brief had been tendered. Thus, there was no longer any action to be performed which could be secured by the show cause hearing. By no stretch of the imagination could action have been taken at that hearing which would have been of advantage to the opposing party, the Commonwealth. In light of that reality, what *could* Petitioner have thought was the reason for the hearing on that date? The only question then open was whether his failure to comply could be excused on any sort of reasonable basis. He failed to provide that basis and thus was held in contempt. At that time, if at no other, Petitioner had surely been provided with notice to an absolute certainty that this was "a charge, and not a suit." *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 446 (1911)

This Court should note, too, that whatever *theoretical* importance the criminal-civil distinction might have in Kentucky, it is insignificant as a *practical* matter. In modern dealings with the special problems posed in the area of contempt. Kentucky's highest

court has observed that such proceedings are in a class by themselves, involving unique aspects, and that attempts to apply ordinary rules of practice and procedure simply cause confusion. *Levisa Stone Corp.* v. *Hayes,* 429 S. W. 2d 413 (Ky., 1968). In the absence of the existence of a criminal statute such as 18 U.S.C. 401, there would seem to be little reason for a state to mirror the great importance placed in the federal system on the distinction between civil and criminal contempt.

Kentucky's highest court finally decided in 1972 to abandon the attempt to maintain a practical distinction between civil and criminal contempt, noting that "the long and tortuous effort of the courts to classify contempts as civil or criminal has been a fruitless search for the impossible". *Miller* v. *Vettiner,* 481 S. W. 2d 32, 34 (Ky., 1972) Rather than distinguishing between civil and criminal contempt, the Kentucky court has noted that "[t]he important distinction to be drawn, it seems to us, is between those contempts for which a person cannot be jailed or fined without a jury trial and those for which he can". *Id.* at 35. Since it is clear that the punishment imposed on Petitioner here did not rise to the level necessary to require a jury trial set by *Bloom* v. *Illinois,* 391 U. S. 194 (1968), it follows that the distinction between the types of contempt is of no importance under state law, and this Court should not reimpose upon the state its long-since abandoned search for a distinction between the two types of contempt.

C. PETITIONER WAS GIVEN AMPLE OPPORTUNITY TO DEFEND HIMSELF AT THE SHOW CAUSE HEARING PRIOR TO HIS BEING HELD IN CONTEMPT BY RESPONDENT.

Among his various due process arguments, Petitioner contends that the proceeding before the Kentucky Supreme Court on October 26 violated due process in that he was not given an adequate opportunity to defend himself. The facts on that date bespeak exactly the opposite. Petitioner was present, he knew the act for which he had to answer, he presented his excuses for that act and he presented his superior in support of his position. To analogize those facts to the absolute disallowance of a defense opportunity in *Groppi* v. *Leslie,* 404 U. S. 496 (1972), transcends credulity.

D. THE ORDER OF RESPONDENT THAT PETITIONER FILE HIS BRIEF BY OCTOBER 11, 1983, WAS CAPABLE OF BEING OBEYED BY PETITIONER AND HIS DISOBEDIENCE WAS WILLFUL.

Similarly, Petitioner's argument that he was put under an order which was physically impossible to obey is of no merit. He says that he received notice of the final "ten day extension" on October 3, that the brief admittedly would require ten days to write and thus he could not possibly have complied by October 11 as required in the show cause order. This is an incredible distortion of the facts. His brief for *Herald* was originally due on July 11, 1983; on that date, he requested (Motion 7/11/83, Appendix, pp. 52-54) and later received (Order 7/29/83, Appendix, p. 55) an ex-

tension for thirty days, thus running to August 19, 1983. On August 10, he moved for (Motion 8/10/83, Appendix, pp. 56-58) and again later received (Order 8/24/83, Appendix, p. 59) a thirty day extension, thus running to September 9, 1983. On September 9, Petitioner again requested a thirty day extension (Motion 9/9/83, Appendix, pp. 60-62), to run until October 9, which would have been a Sunday. The October 3 show cause order (Order 10/3/83, Appendix, p. 63) was in response to the motion of September 9 and gave Petitioner until October *11*, two days longer than he had requested in his motion. The October 3 order was *not* an eight day extension, as Petitioner contends; it was the thirty day (plus two) extension which Petitioner had earlier sought. Thus, the show cause order which Petitioner says he could not possibly have obeyed (because it gave him only eight days to do ten days of work) would have been impossible *only* because on October 3 Petitioner had not done the first bit of work on the brief. In fact, it was not until eight days later, on October 11, the day the brief was due, that Petitioner first checked out the record in the *Herald* case. It was for exactly that reason that Petitioner was held in contempt. He had sought extension after extension, yet he had not even then examined the record in the case. Petitioner wants to construct a case of impossibility but the only thing which made compliance impossible was his own action. Surely a person cannot create his own impossibility and then escape any responsibility for it by pleading its existence.

E. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PRESUMPTIONS AND ALLOCATIONS OF BURDEN OF PROOF APPLIED BY RESPONDENT.

It is difficult to respond to the hodge-podge of arguments which Petitioner makes concerning the appropriate standard of proof and allocation of burden of proof in a contempt proceeding. Those are matters which might assume significance in the setting of a contempt penalty necessitating a trial by jury (i.e., one involving punishment by fine in excess of $500 or imprisonment for more than six months). *See, e.g., Bloom* v. *Illinois, supra.* For the Petitioner to analogize to these facts from the holding of this Court in regard to the imposition of a *death sentence* in *Gardner* v. *Florida,* 430 U. S. 349 (1977) is surely to stretch even the most tenuous of arguments past the breaking point. In this "misdemeanor" variety of contempt, it is difficult to imagine how Petitioner envisions this standard and allocation should have functioned. It would seem absurd to require the highest court of a state to in effect charge itself as a trial judge would charge a jury. No guidance is provided by Petitioner's citations to an involuntary psychiatric commitment proceeding (*Addington* v. *Texas,* 441 U. S. 418 [1979]) or to a juvenile criminal proceeding (*In Re Winship,* 397 U. S. 358 [1970]). Petitioner suggests that the Court should have engaged in the presumption that he had complied with the October 3 order. The suggestion is patently absurd since the records of the Court themselves show that no brief was filed on October 11 and consequently that the show cause order had been

disobeyed. Even now, it still is factually clear that the brief was *not* filed by October 11. If Petitioner is suggesting that the filing of his motion (Motion 10/11/83, Appendix, pp. 64-67) on October 11 for still another extension was compliance with the show cause order, a response seems unnecessary; the show cause order required a *brief, not a motion* and everyone in this proceeding must admit that no such brief was received on October 11. That the Supreme Court of Kentucky, or anyone in the world for that matter, should have engaged in a presumption which was so obviously false is a proposition for which Petitioner offers no support; indeed, to do so would be to depart from reality and into some sort of Alice in Wonderland domain.

In this case, the *facts* showed that Petitioner did not comply with the October 3 order of the Supreme Court of Kentucky. That is a truth not denied by Petitioner at the show cause hearing and cannot now be denied by Petitioner. These facts seem far removed from the single, heat of the moment outburst by an attorney which this Court held insufficient to justify a contempt in *Eaton* v. *Tulsa,* 415 U. S. 697 (1974). It is a *fact* that Petitioner appeared at a hearing before the Supreme Court of Kentucky to offer his explanation, that he knew that the purpose of his being there was to offer such explanation and that he made no request, past his own "testimony" and that of his superior, to offer any proof in his own defense. That is a truth which Petitioner cannot now deny. It is a *fact* that the highest court of the state of Kentucky found his explanation insufficient to excuse the dis-

obedience which Petitioner admitted and still must admit. Far from being lacking in (as Petitioner terms it) "competent, probative evidence", the record in this case does not present *any* factual difficulties; the record is factually clear. From the facts which are here beyond contest, it certainly must be said that a reasonable trier of fact could have concluded that Petitioner was in contempt and that is a conclusion which this Court should not disturb. *Cf. Harris* v. *United States,* 404 U.S. 1232 (1971); *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974); *Jackson* v. *Virginia,* 443 U. S. 307 (1979) Neither does the case present the sort of constitutional difficulties which Petitioner has advanced to the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the Petition for Writ of Certiorari and let stand the decision of Respondent Supreme Court of Kentucky holding Petitioner in contempt of that court.

Respectfully submitted,

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Frankfort, Kentucky 40601

Co-Counsel for Respondent

CERTIFICATE OF SERVICE

I, John R. Leathers, counsel of record for Respondent, hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543; Hon. J. Vincent Aprile II, 2520 Meadow Road, Louisville, Kentucky, 40205, Counsel for Petitioner; and to Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky, 40601; this the 20th day of April, 1984, by my personally depositing same in a United States mailbox, first class postage prepaid. I further certify that all parties reqired to be served have been served.

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APPENDIX

IN THE

SUPREME COURT OF KENTUCKY

No. 83-SC-866-I

IN RE: WILLIAM M. RADIGAN

TRANSCRIPT OF HEARING
October 26, 1983

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Chief Justice Stephens: The purpose of this hearing is to show cause, where Mr. Radigan will attempt to explain, to show cause why he should not be punished for contempt for not filing an order of this court, or complying an order of this court, vis-a-vis the filing of brief on a certain time. I talked to the court and, and, certainly, Mr. Radigan, you can go ahead and make whatever explanations that you want. I've also, with permission of the court, Mr. Isaacs, let you say something, a very limited amount, but I think, Mr. Radigan, take the stand, as it were.

Mr. Radigan: Thank you, your honor. I think that I can explain the situation in one very simple word, and it's caseload. Unfortunately, the Department of Public Advocacy, which requires the handling of all indigent briefs under statutes, at the present time, has fewer public attorneys than it has had in the last five years. At the same time, we've seen an increase of over, from my figures that I'm familiar with, over one hundred percent number of appeals in the last two years. Essentially, what we're faced with is a glut of appeals and too few attorneys, at the same time, operating under a—

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Justice Vance: Mr. Radigan, let me interrupt you just a minute.

Mr. Radigan: Certainly, Justice Vance.

Justice Vance: Do you, is it true, then, when you're talking about the caseload, that if it had not been for the caseload, you could have complied with this order to get the brief in in time?

Mr. Radigan: Well, for instance, your honor, I had a very simple situation. At the time that I was, the order was entered on this case, I was under a similar order from the Court of Appeals of Kentucky, in a brief that I had already started working on.

Justice Aker: A contempt order?

Justice Leibson: Show cause order?

Mr. Radigan: It's a show cause type order, yes, your honor. And I was attempting to get that brief finished, at the same time that this court's order came out. It was simply physically impossible for me to get, timewise, to get any type of preparation done on this brief to comply with this court's order.

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Justice Wintersheimer: Mr. Radigan, this is the first time that we've heard that from you, and I think, I don't know of any other document that you have submitted here that said, I'm under other order by another court to show cause.

Mr. Radigan: Well, it was not, it was, specifically, not a show cause order. The Court of Appeals is proceeding under the type of manner in which they were saying that no further extensions will be granted.

Justice Vance: It was not a show cause order, then?

Mr. Radigan: It was not, specifically, a show cause.

Justice Vance: This was the only one that was a show cause order?

Mr. Radigan: That's correct, your honor.

Justice Vance: And you elected to do something else rather than this?

Mr. Radigan: No. your honor. My experience with the Court of Appeals, and they've done this in the past, is that, if you do not file that brief, after they

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say that there is, this is the last extension that will be granted, they had the record show cause appearance in the past. That was why I was operating under that assumption. But, no, I was not trying to delay on this case. If you'll examine the pleadings that I have filed, as far as the extension motions, you'll see, first of all that, even though the record in this case was received by this court on June 10th, I did not become assigned to the case until July 5th. The thirty day original period of time had already nearly run by the time I got the case. Since July 5th, I filed, including up to the tendering of Mr. Harold's brief to this court on last Friday, I filed a total of 14 appellant briefs in this court and the Court of Appeals of Kentucky and several briefs in the Federal District Court one in the Sixth Circuit.

Justice Vance: What did you do from the time you got the show cause order on down until the day that this brief was due?

Mr. Radigan: I began work, I completed working on that Court of Appeals brief. I had a discretionary review brief that was due on the Monday after this court issued a show cause order. I then proceeded to

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begin working on this case. I completed this case within ten days of beginning it. And I, the very simple explana-

tion is this, we had too many cases, and not enough time, and not enough attorneys.

Justice Vance: You commenced, you completed this case within ten days from when you began on it?

Mr. Radigan: When I began rea—

Justice Vance: And you were ten days late, and so, therefore, you did not even begin on it until the thing was due, under the order.

Mr. Radigan: That's correct, your honor. I had no opportunity, no ability to do that. My caseload and work and other—

Justice Leibson: Was there any reason why you wouldn't file with us, then, earlier than October 11, some explanation? I find it extremely unacceptable, completely unacceptable would probably be a better terminology, this business of filing for an extension on the last day in the, that the, when the brief is due. I cannot believe that, is there a good reason why a brief can't be completed by a certain time, they're not known before the day the brief is due.

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Mr. Radigan: That is very possibly true, Justice Leibson.

Justice Wintersheimer: Well, you just said that you know all about this workload problem. And the problem assignment in the internal operating procedures of the Public Defender, Advocate's Office. So you knew all that in advance.

Mr. Radigan: If it was up, if it was my option, I would file, in the beginning, a motion for a sixty day extension on every case.

Justice Wintersheimer: Why isn't it your option?

Mr. Radigan: Because we have been instructed, through court personnel of this court, not to file a sixty

day extension motions and only to request thirty days at a time. If that's, I mean, if you would like us to file for larger extensions at the beginning, I would be glad to convey the message back. But we have been operating under the information, that we should file only for thirty day extensions.

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Justice Leibson: What we would like is, that you tell us, when you can tell us, with integrity, when the brief can be filed, and that you, then perform according to the representation. That is what we would like.

Mr. Radigan: Now, would this be in the manner of filing an extension motion, say for sixty days right at the beginning?

Justice Leibson: Why should you do that unless you know then that there is some reason why you are going to need an extension?

Mr. Radigan: Well, I know, for instance, that I had a brief to do before this court, tomorrow, next week, and in the Court of Appeals the week after that. The problem that I have right now is that, until I begin examining the record of the case, that I do not know how long it will take to, for me to prepare the brief on that case. I simply do not know. It could be a very short record, with extensive issues, that will take an extensive amount of time to research and to prepare the brief; or it could be a long record with sub—, a very simple issue in it, that, once I completed

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reading the record and setting out the statement of facts, it might take me less than a day to prepare the actual argument itself. I cannot say until I've begun to read a record and prepare and analyze the issues and research them, how long it will take me in a specific case.

Justice Gant: May I ask you a couple of things?

Mr. Radigan: Certainly, Justice Gant.

Justice Gant: First, I abhor automatic thirty or automatic sixty days. I think the extension should relate to the case itself and not, that's just a principle, but you said something about the fact that this case was not assigned to you until, actually until after the show cause was entered. Is that correct?

Mr. Radigan: No, no, no, no. It was, it was, the record was received by this court on June 10th. It was not assigned to me until, until July 5th, and that was just the file being given to me. So the thirty day, first extension, thirty day briefing period, all but five days, had already gone by the time I got the case.

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Justice Leibson: Well, but, there's some kind of inefficiency—

Justice Gant: This, this, then, the ten points, and I'm sure, I'm sure that Mr. Isaacs is interested in this, because it seems to me that when there's a twenty-five delay, day delay in, in just the assignment, that we're already in trouble. We start—

Mr. Radigan: You can imagine how I feel. I feel like I'm already between a rock and a hard place, when I get assigned some of these appeals.

Justice Gant: You've got an appeal due in five days that you didn't know about?

Mr. Radigan: That's correct.

Justice Gant: And it seems to me, I'm just bringing it up, to hope that that thing can be cured, that when the record is completed, it could certainly be assigned in an expeditious manner, so that you, at least within that first thirty days, know where you are on the case and how long its going to take.

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Mr. Radigan: In this case, I didn't even know the case was coming in until I had five days to brief the case, and I had to file an extension order.

Justice Vance: But this hearing is not regarding that, that delay. This hearing is regarding the reason that you didn't comply with the order to file a brief on a certain date. Do you recall what day you got that order or what day it was entered?

Mr. Radigan: The order, itself, I believe, I received, let's see, it was, originally, due on October 10th. I received the order on the previous Thursday, I believe, and I did receive a telephone call from court personnel that the order was coming out, though.

Justice Vance: And that would be, then, October 7th or something—

Mr. Radigan: Something like that, yes, sir.

Justice Vance: And when was the, when did that order say the brief was due?

Mr. Radigan: On Tuesday, October 11th.

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Justice Vance: You mean the order just gave you four days in which to prepare a brief?

Mr. Radigan: Yes, it does. I believe it was issued on Monday or Tuesday. I did not get it until Wednesday, although, like I said, I did receive a phone call in regard to that matter and was orally informed by telephone that extension order was being entered. But, as I said, I was in the middle of working on a Court of Appeals brief that was filed, eventually, on October 12th or 13th, in which the Court of Appeals told me they were not going to grant any further extensions. And I was, at the time that I received even the telephone communications, I did not have, I was in the middle of preparing that brief at that time,

and I felt that I could not drop that, in which I felt that I was insi—

Justice Vance: You have a choice, then, of either dropping that and obeying this order or making your own election not to obey this order, but to complete the work that you had started for the Court of Appeals, and your choice was to violate the order of this court?

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Mr. Radigan: I felt, your honor, that I either was going to get in trouble with this court or with the Court of Appeals.

Justice Stephenson: Well, you were under—

Mr. Radigan: And I was under—

Justice Stephenson: Under no show cause order from the Court of Appeals?

Mr. Radigan: No, your honor. No, your honor.

Justice Stephenson: You anticipated one?

Mr. Radigan: I anticipated one, based on prior practices of the Court of Appeals.

Justice Aker: In other words, you'd rather have seven people chewing on you than three people.

Justice Stephenson: Mr. Radigan, I, Mr. Radigan, I understand your response. You said something there about attendance at the meeting at—

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Mr. Radigan: At the District Judges Conference, that's correct, your honor. I had been asked, in April of last year, to attend the District Judges Conference on September 14 and provide a lecture for them during that morning. I'm sorry, Justice Leibson, we never got back to your question.

Justice Leibson: I think Justice Gant covered it, which is the, is the, you admitting to this inefficiency in the general, in the office, which I assume to be as much your re-

sponsibility as anybody else's. I don't understand the system whereby the record is filed on the 10th of June and the case is assigned to you on the 5th of July. But that's beside the point. The one thing that I, that I haven't heard any kind of satisfactory explanation for at all is why you knew, why, when you got this order, you knew you couldn't comply with, as you maintain your position, out of respect for this court, you didn't immediately file something with this court telling us the reasons so that, rather than waiting until the day when the brief is due, and then filing still another routine motion for an extension.

Mr. Radigan: I apologize. It was a misjudgment on my part, your honor.

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Justice Aker: Of course, I'm sure it's not true, but it's almost like you're trying to remove from the center of position, rather we had to take a stand. Now. I don't know if you got, you've got Cleaver to protect your clients. I guess you'd have 1983 to protect you from us in certain instances.

Mr. Radigan: I don't like to look at it like that, your honor.

Justice Aker: But we're not a suspicious group, or I'm not. I'll speak for myself, individually, but given the choice of a Court of Appeals and the Supreme Court of this Commonwealth, and the fact that you were under notice, you anticipated to show cause, knowing what they said about Cleaver. So your last extension, your client's still going to be protected. Your client, in fact, is going to be protected here, most likely. So the only recourse we have to try to speed this up is, is again to motivate the attorney. And I, you know, I was disappointed. I'm probably not as upset as most of the members of the court, but I was disappointed. And while I'm at it, we talked,

someone mentioned earlier about someone filing a motion, beforehand, asking for an extension on one of these show causes.

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Well, we just turned around and rejected one of those in motion panel. On Monday, they filed one saying that they couldn't get this done. So you-all probably don't have a copy of the order yet, but I don't know.

Mr. Radigan: The problem, the problem I have, very frankly, let's put it into perspective, as far as myself right now. Because we are in a situation right now in the office, where the office does have the technical responsibility, under the statutes, to handle all these appeals that come in. As I said, we have more appeals and fewer attorneys. We're placing y—, myself, and I'm speaking for myself when I reflect some of the feelings of the other appellant attorneys in the Department of Public Advocacy, to the extent that you're placing us in a situation where we are going to, in order to protect ourselves, have to make a choice when these cases are attempted to be assigned to us, that if we have too many cases at that time, and we are starting to face these show cause orders, we're, to protect ourselves, we're going to have to refuse the assignments from our supervisors, because of ethical reasons. And there's no question that there is, under the code of ethics, obligations to refuse cases you can't handle within

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the time frame. Now, place it into our perspective for a moment, in my perspective, because what we're faced with is very simply the situation where, if I, in order to prevent future occurrences of this, refuse that assignment which I can't do, under the canon of ethics, then what happens to that appeal? What happens to that client? And I don't know. We're facing a crunch right now. We're faced in

a situation where there's been an increase in these appeals and we're, the individual client is, Justice Akers, probably protected under Cleaver, but we're getting to the point, and I can understand, and please accept this, I understand the courts desire to speedily process these appeals. We'd like to process them. I don't like a backlog on my, on my cases. But we simply cannot handle these cases within sixty or ninety days, as it stands right now. And what this type of proceeding is going to do, unless you feel that we're acting in bad faith, and I hope you don't at least for myself, right now, we're going to have to face that decision of rejecting assigned cases from our supervisors. And I know, Mr. Posnansky is head of the Appellant Branch, and Mr. Isaacs is the Public Advocate. Doug does not want that situation to occur. I think what we have to do is reach an

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understanding on these. I can assure you, gentlemen, we are not trying to delay these cases. We have clients in prison, who are wanting to appeal these cases and process them as quickly as possible. I hope you feel that we want to process them as quickly as possible, and that we're not trying to delay the process of justice in this court, or any court. If you felt that way, I feel that condemnation is terribly justified. But what am I supposed to do under these type of circumstances where I've got too many cases, and I might find myself again before this court or the Court of Appeals of Kentucky because of a circumstance that I don't know that I can handle. And what's going to happen to those other cases? I don't know the answers, but it's putting our, putting the entire system that we have going right now, imperfect as it may be, it's putting it into a very grave state of jeopardy because there might be longer de-

lays and more confusion and more litigation, which I don't want, and I know that you don't want.

Justice Aker: Let me ask this question.

Mr. Radigan: Certainly, your honor.

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Justice Aker: If you're found in contempt here, can you appeal it to the Court of Appeals?

Mr. Radigan: To the Court of Appeals of Kentucky?

Justice Aker: Yes.

Mr. Radigan: I don't think so.

Justice Aker: If you're found in contempt in the Court of Appeals, can you appeal it here?

Mr. Radigan: I'd say so, yes.

Justice Aker: You may have made a bad choice.

Mr. Radigan: It's very possible, I have. As I said, I was in the middle of working on that other case, and I could not see dropping it, right in the middle of that to start working on this case. That was perhaps the judgment, or a mistake in judgment, on my part. I don't know. That's for your honors to decide. But I want you to, please, place into perspective what the larger problem is, because I can predict, very safely that either we're going to be having more hearings like this, or we're going to

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have Mr. Isaacs and Mr. Posnansky in a quandry, as to what to do with these backlog cases that the appellant staff, because of ethical considerations, and because of the desire of this court to process these within a certain time period, that we're going to have to start refusing these cases, and I have no idea what's going to happen to those appeals at that time.

Justice Aker: Well, I suspect that the federal courts will start issuing writs, and these people will be going out on the streets. And then, the public will be screaming

at us, and the legislature will be sitting there yelling, ho-hum.

Mr. Radigan: And we're going to be still sitting under a hiring freeze that we can't replace people that we'd like to replace right now. I, gentlemen, it's a mess, there's no question about it. But it's one that I think should be perhaps, if I could suggest, resolved by discussion and working together on these things, rather than grant issues—

Justice Leibson: You've already told us, you have no answers.

Mr. Radigan: Pardon me.

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Justice Leibson: I don't want to discuss, I assume that you're in the middle of this problem and have been for, for a long time, and you've already announced you have no answers. There doesn't seem to be a lot to discuss.

Mr. Radigan: I have, I have some suggestions, if we could hire more attorneys, we'd be in better shape. If we had more money, to the budget, we'd be in better shape.

Justice Stephenson: We have no control over that.

Justice Aker: I think one thing that aggravates some of us, and of course, I know you're under your ethical considerations to do the best job possible, but it's so many of these things, and you-all have heard thousands of times, Mr. Isaacs heard it when we were on that Governor's Task Force and so forth, is the issues raised many times could be more selective. I mean, seems like that half, over half of the briefs are just inane, philosophical, esoteric questions that keep hoping that, maybe some day, it might strike. And I know you're trying to preserve it, but I just, I think there is a little selectivity here that could assist in a whole lot.

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Chief Justice Stephens: I would modify that by saying a whole lot of selectivity.

Justice Leibson: We sometimes read pages and pages of briefs and never do find out what you-all are really trying to, what particular facts that you consider important and what particular issues there are in the case, almost have to start with the argument heads and read the arguments first, and then try and go back through the facts and figure out what you—

Justice Wintersheimer: I don't think that applies necessarily to you, Mr. Radigan.

Mr. Radigan: I think one of the problems we're dealing with right there is the fact that we had, with the prior Supreme Court of Kentucky, several instances where briefs were dismissed because of an insufficient, or remanded and ordered to be refiled because briefs were not, the statement of facts in the briefs, were not considered to be in sufficient detail. I've been here for eight years, eight and a half years, doing appellant work for this court. And in '77 and '78, our original practice was to have an extremely brief statement of the facts of a case and to put most of the factual arguments within the, the issues themselves. We had, we then had—

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Justice Wintersheimer: We had that discussion with Mr. Marshall in the back, in the conference room last month. And it seems, I don't know who we'll have it with in November or December, but we hope that it can stop. You know, maybe, you talk it over.

Mr. Radigan: This is, this is, this is some of the problems that we have. We have situations where different philosophies with different justices bring about, perhaps, different results. And we try to adapt to those situations

and remember the same kinds of problems that we've had before.

Chief Justice Stephens: Well, let me just say something. I, I have been over to the offices on several occasions, as you know, both when I was Attorney General and when, since I've been on the court, I, very frankly, it may not solve this particular problem today, but I am a little disappointed that you waited until Monday. I, if it had been me, I would have filed something the very day I heard about the show cause order. I wouldn't have waited until the following, see that doesn't make, I, I am very aware of Mr. Isaac's talents, and I don't expect him to be a magician. But I do expect that there will be a positive change in the spirit of

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cooperation and hopefully, that some of this court's individual and collective, suggestions will be listened to, try to address the problem. In a very real sense, Mr. Radigan, the Attorney General has a similar problem.

Mr. Radigan: I recognize that, your honor.

Chief Justice Stephens: And somehow they manage to stumble along and take care of things, reasonably well, I guess.

Justice Wintersheimer: It's easier.

Chief Justice Stephens: Yeah, I would like to suggest, if it's alright with the court, that we let, unless there's anymore questions, that we let Mr. Isaacs have just a couple of minutes, because some of us have rumbling stomachs up here. Anymore questions of Mr. Radigan? I'm obviously not trying to cut the discussion off, but it seems we're into sort of policy matters now.

Mr. Isaacs: Thank you. May it please the court. I thank you very much for allowing me to appear before you. I wish that my first introduction to the court had been

under better circumstances, but I do appreciate the opportunity to discuss these issues.

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I'm not making any statements concerning this particular case because many of the issues came up long before I'm there, and I don't feel that it would be proper for me to do so. I did want to come before you and very briefly, because I know the hour, to tell you that I consider this problem extremely serious. The first day I was on the job I found out that there were show cause orders issued to some of my attorneys. I think that my reaction to that, in the office, surprised many of my attorneys because I considered this to be extremely serious. I do not want any of my attorneys held in contempt; and if they're getting show cause orders, I wanted to know immediately, why that was happening. Being new to the job, I did not know the history of what had happened in the past, but I wanted to find out very quickly. I have had my staff, my court staff, the director, and some of the people looking at this issue because I'm extremely concerned about it. I do have problems with hiring freezes, and I have to be creative in solving this. And I don't have any specific proposals to give you today. We're looking at reducing caseloads, different ways of handling appeals, assigning more attorneys, looking at the structure of the office; and to be honest with you, my, my concept is, nothing is

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sacred. We do it, as long as we can do it legally, and we're going to try to find a way to cut down on the extensions of time because I consider it to be a serious problem. And I'm working at it. It's one of my top priorities.

Justice Leibson: Well, one of the Department's problems now, and this, you overlooked it, I'm going to risk a belaboring point. One part of the problem is that the

motion for extension comes in on the day the brief is due. In other words, it isn't a motion at all. It's an order because of the Cleaver or whatever, or we're in a position where we can't deny the motion, and without, in essence, being a release order for the prisoners. Now, we can't tolerate a situation where we don't exercise any judicial discretion. I refuse to sit up here and rubber stamp motions for extension. That's what it comes down to.

Mr. Isaacs: I agree with you one hundred percent. And it's been very enlightening for me to be here this morning because I don't know all the sides of the issue. I will tell you this, when I talked to specific attorneys, I've said to them, if you know you've got a problem, file your motion now. Let the court know. Let them know how much time

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you realistically need. I have had this discussion with specific attorneys. I have advised them on it. And in the Marlowe case, that is what they did. The order that, which I saw yesterday for the first time, that was previously discussed. That is the reason that they did that, was at my suggestion, tell the court exactly what your situation is. And that is the approach that I would favor. But I, what I'm, what I'm saying is, I want to work with the court and my staff to try to resolve these problems. You all have ideas because you deal with this everyday, and I'm willing to listen to any suggestions because I'm trying to make it work, if I can, given what I have, what the legislature has given me, and with what the Governor and the Executive Branch gives me in terms of staff. That's the reason I wanted to appear before you to tell you that I'm concerned about it, and I want to work on this problem. And I need your-all's assistance to tell me the problems tht you're having so I can communicate that to my staff to try to address those problems. And that is a very, I

understand that. My, in the other practice that I've done, that was always my, the way I did it, is that I, if I have a problem, you bring it to the court's attention immediately.

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Justice Aker: Well, maybe Marlowe, one was a little early and the rest of them are a little late.

Mr. Isaacs: Well, maybe that's the case. I don't know. I don't know. But that's, that's you know.

Justice Aker: There's a happy medium somewhere.

Mr. Isaacs: That's, me and you both have to find. But I do appreciate the opportunity to express with you how concerned I am with the problem. I've, I have instituted some internal controls though. As you know, as an attorney supervising attorneys. I don't have any discretion to tell an attorney to or not to file a motion in a particular case. But I've asked them to review these problems with me, personally, when they come up, and to advise me as soon as they know they are going to have a problem, so we can, so I can get some understanding of the full depth of the problem, and maybe, look at some alternatives to solve them. I don't have any answers. I wish I did. But—

Justice Stephenson: Mr. Isaacs, I can suggest at least a partial answer. I suggest that you review some of the motions for discretionary review and some of the

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briefs. And my experience tells me you will find a fair percentage of those are just absolutely without merit, just frivolous. In too many of the briefs, arguable points are inclined to get lost in this plethora of just, points of argument that are absolutely without merit. I think with the amounts of paper you're dealing with that could be, using some judgment, that could be reduced.

Mr. Isaacs: That is one issue that I have already written down in my notes, listening this morning.

Justice Stephenson: I'm glad. I look forward to—

Justice Gant: I'd like to add that I was not a member of the court at the time, but someone suggested that they wanted a larger recitation of the facts but—

Chief Justice Stephens: I think there's only one member here that was—

Justice Aker: And he voted against it.

Justice Gant: But I don't think that that person is no longer on the courts, or alive, as I recall.

Justice Aker: Yeah.

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Justice Wintersheimer: I think that that problem is inherent in your system but also in the Attorney General's system.

Justice Gant: The Attorney General is—

Justice Wintersheimer: Mindless recitation of all these—

Justice Gant: We had one argument before your time. Mr. Radigan was not involved, where your side gave us six pages, the Attorney General eight pages of the facts of the case, of the crime that occurred, and the only argument was about the PFO stage of the trial. What happened, what witness testified that Joe Blow broke into the house, or got caught running down the street, or whatever, had nothing to do with the PFO stage of the thing. And yet we had all that claptrap to go through before we—

Justice Leibson: We know, that the trial comes in, you know, piecemeal, but facts of the brief should not come in piecemeal. But the issue is whether the house was broken into. That issue ought to be stated, and the testimony that relates to that issue ought to immediately be stated on that issue.

Justice Aker: In narrative form.

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Justice Leibson: Right.

Justice Aker: Not witness so and so testified. There you ought to put a reorder on that, anything that looks like a biography, or a diary, of course, not Mr. Geoghegan, but—

Justice Gant: No.

Chief Justice Stephens: I would tell the members of the Court that, as soon as Mr. Isaacs gets his breath, he's probably lost a little of it here today, but as soon as he gets his breath, (inaudible) I'm going to meet with him. And I'm sure that you got some of the message, and I will glean other suggestions and present them to you. Hopefully, that it won't fall on deaf ears as its done in the past.

Mr. Isaacs: I can assure that it won't fall on deaf ears.

Chief Justice Stephens: I wasn't talking about your ears.

Mr. Isaacs: And I can assure you that any message that I get from this court will be set forth loud and clear to my office because we're all part of the same system, and the only way it can work is if we all

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work together. And just to end on a very brief note, that I'm willing to work with you and meet with you at any time concerning any problem concerning my office and look forward to doing so. Thank you all, very much.

Chief Justice Stephens: Anymore questions from members of the court?

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I, Juanita M. Toole, do hereby certify that the foregoing pages are a complete and accurate transcription of the audible testimony at the time and place and in the matter stated in the caption hereof, said proceedings having

been tape recorded by the clerk and subsequently transcribed under my direction.

Witness my signature this March 19, 1984

(s) Juanita M. Toole
Notary Public

My Commission expires 2-17-86

COURT OF APPEALS OF KENTUCKY

No. 83-CA-1340-I

CHARLES FREDERICK GREEN - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Fayette Circuit Court
Action No. 82-CR-664

ORDER

The Court, having considered appellant's motion for an extension of time in which to perfect the appeal, there being no response thereto, and having been otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, GRANTED, to and including September 15, 1983. No further motions for an extension of time to perfect the appeal will be granted.

ENTERED: 9-7-83

(s) John P. Hayes
Honorable John P. Hayes
Chief Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 83-CA-1340-I

CHARLES FREDERICK GREEN - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Fayette Circuit Court
Action No. 82-CR-664

ORDER

BEFORE: DUNN, HOWARD and MCDONALD, JUDGES.

It is ORDERED that the appellant's motion for an extension of time in which to file his brief be, and is hereby, GRANTED. It is further ORDERED that the appellant's motion for leave to file a brief in excess of twenty-five (25) pages be, and it is hereby, GRANTED. Appellant's brief is ORDERED filed on the date of entry of this order.

ENTERED: 10-31-83

(s) Wm. R. Dunn
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION AND AFFIDAVIT FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL—
Filed July 11, 1983

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of thirty (30) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal appellate systems, including briefs filed on June 17 (Supreme Court of Kentucky) and June 27 (Court of Appeals of Kentucky), and July 11, 1983 (United States Court of Appeals for the Sixth Circuit).

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983. Consequently, the undersigned counsel has had less than one (1) week, not thirty (30) days, to work on appellant's case.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the

amount of time that the undersigned counsel can spend on his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California*, 386 U. S. 738, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The applicant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange.

WHEREFORE, the appellant respectfully requests this Court to grant an extension to and including August 10, 1983, in which to file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Subscribed and sworn to before me by William M. Radigan on this 11th day of July, 1983.

(s) Patsy C. Shryock
Notary Public—State at Large

My Commission expires: 11/21/84

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 11th day of July, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 11th day of July, 1983.

(s) William M. Radigan

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER GRANTING EXTENSION

Appellant's motion for an extension of time, to and including August 10, 1983, in which to file his brief and perfect the appeal in the above-styled action is granted.

ENTERED July 29, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWE'LTH OF KENTUCKY - - - *Appellee*

MOTION AND AFFIDAVIT FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL—
Filed August 10, 1983

* * * * * * * *

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of thirty (30) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal appellate systems, including briefs on July 11 (United States Court of Appeals for the Sixth Circuit), July 25 (Court of Appeals of Kentucky), and August 9, 1983 (Court of Appeals of Kentucky).

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the amount of time that the undersigned counsel can spend on his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime

will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California*, 386 U. S. 738, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California, supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The appellant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange.

WHEREFORE, the appellant respectfully requests this Court to grant an extension to and including September 9, 1983, in which to file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Subscribed and sworn to before me by William M. Radigan on this 10th day of August, 1983.

(s) Peggy S. Redmon
Notary Public—State at Large

My Commission expires: December 9, 1985

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 10th day of August, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 10th day of August, 1983.

(s) William M. Radigan

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER GRANTING EXTENSION

Appellant's motion for an extension of time, to and including September 9, 1983, in which to file his brief and perfect the appeal in the above-styled action is granted.

ENTERED August 24th, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL

Filed September 9, 1983

• • • • • • • •

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of thirty (30) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal appellate systems, including briefs filed on August 12 (Supreme Court of Kentucky), August 18 (United States District Court for the Eastern District of Kentucky), August 19 (United States District Court for the Western District of Kentucky), and September 7, 1983 (Supreme Court of Kentucky).

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the amount of time that the undersigned counsel can spend on

his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California,* 386 U. S. 378, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay,* 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California, supra.* Accordingly , when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The appellant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange

Wherefore, the appellant respectfully requests this Court to grant an extension to and including October 9,

1983, in wihch the file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 9th day of September, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601 this 9th day of September, 1983.

(s) William M. Radigan
by MAP

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER

Appellant's motion for an extension of time is granted. Appellant shall file his brief and perfect the appeal in the above-styled action on or before October 11, 1983.

If appellant's brief is not filed on or before October 11, 1983, counsel for the appellant shall appear before this court on October 24, 1983, at 10:30 a.m., in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief.

Stephenson, Vance, Wintersheimer and Aker, JJ., sitting. All concur.

ENTERED October 3, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION AND AFFIDAVIT FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL—Filed October 1, 1983

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of ten (10) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal systems, including a brief filed with the United States Court of Appeals for the Sixth Circuit on September 28, 1983. Additionally, the undersigned counsel has completed a brief which is scheduled to be filed with the Court of Appeals of Kentucky on Wednesday, October 12, 1983. During this same period, the undersigned counsel has had two (2) oral arguments and one (1) trial in the Clay Circuit Court. Finally, the undersigned counsel participated in the 1983 District Judges Training Conference on September 14, 1983.

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the amount of time that the undersigned counsel can spend on his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California*, 386 U. S. 378, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The appellant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange.

WHEREFORE, the appellant respectfully requests this Court to grant an extension to and including October 21, 1983, in which to file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Subscribed and sworn to before me by Wililam M. Radigan on this 11th day of October, 1983.

(s) Patsy C. Shryock
Notary Public—State at Large

My Commission expires: 11/21/84

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 11th day of October, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 11th day of October, 1983.

(s) William M. Radigan

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